

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 YAVAPAI COUNTY, ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 DEC -6 AM 9:58

SANDRA A. HARKHAM, CLERK
Jacqueline Harshman

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-NINE

JUNE 21, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs) Case No. V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant)
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15 BEFORE THE HONORABLE WARREN R. DARROW
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Tuesday, June 21,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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1 APPEARANCES OF COUNSEL:

2 For the Plaintiff:

3 YAVAPAI COUNTY ATTORNEY'S OFFICE
4 BY: SHEILA SULLIVAN POLK, ATTORNEY
5 BY: BILL R. HUGHES, ATTORNEY
6 255 East Gurley
7 Prescott, Arizona 86301-3868
8

9 For the Defendant:

10 THOMAS K. KELLY, PC
11 BY: THOMAS K. KELLY, ATTORNEY
12 425 East Gurley
13 Prescott, Arizona 86301-0001
14

15 MUNGER TOLLES & OLSON, LLP
16 BY: LUIS LI, ATTORNEY
17 BY: TRUC DO, ATTORNEY
18 355 South Grand Avenue
19 Thirty-fifth Floor
20 Los Angeles, California 90071-1560
21

22 MUNGER TOLLES & OLSON, LLP
23 BY: MIRIAM L. SEIFTER, ATTORNEY
24 560 Mission Street
25 San Francisco, California 94105-2907

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1 P R O C E E D I N G S

2 THE COURT: The record will show the presence
3 of Mr. Ray, represented by Mr. Kelly, Mr. Li and
4 Ms. Do. The state is represented by Ms. Polk and
5 Mr. Hughes. The jury is present.
6

7 Good morning.

8 Ms. Polk.

9 MS. POLK: Thank you, Your Honor.

10 Good morning.

11 Heat stroke. The No. 1 criteria in
12 diagnosing heat stroke is to examine whether the
13 patient was in a heated environment.

14 (Audio played.)

15 MS. POLK: Heat stroke. First you start
16 sweating profusely.

17 (Audio played.)

18 MS. POLK: Then your blood pressure falls.
19 And if not removed from the heat, you begin to
20 experience an altered mental state.

21 (Audio played.)

22 MS. POLK: If not removed from the heat, you
23 will slip out of consciousness, the hallmark of
24 heat stroke. And slipping out of consciousness,
25 according to both Dr. Dickson and Dr. Paul, rapidly
leads to brain damage, cardiac arrest and death if

1 not removed from the heat. It is imperative to
2 remove a person from the heat immediately, to
3 recognize the altered mental status that is the
4 hallmark of heat stroke.

5 (Audio played.)

6 MS. POLK: To prepare for a heat event such as
7 a sweat lodge, one should get plenty of sleep, eat
8 well, be hydrated, and look out for one another,
9 because a person suffering from heat stroke will
10 not recognize the need to get out of the heat due
11 to their altered state.

12 As Dr. Dickson told you on May 10 when he
13 testified, if you're unconscious, you're not going
14 to do as well as somebody that's just acting a
15 little goofy. I mean, generally the people that
16 have gotten all the way to unconscious, and then if
17 they don't wake up quickly so somebody is -- one of
18 the things we teach is to treat these patients, get
19 them cool very, very quickly -- the people that
20 have gone to heat stroke.

21 The longer you wait to cool them down,
22 the much worse they're going to do. If you wait
23 more than an hour or two, their chance of death
24 goes way up. So the sooner you cool them, the
25 better they're going to do. So people that are

1 unconscious definitely do worse. But if you can
2 get to them early and you can cool them off and
3 they wake up, it's a great sign.

4 There is no question, ladies and
5 gentlemen, no reasonable doubt, that Kirby Brown,
6 Liz Neuman and James Shore all died of heat stroke
7 or exposure to the extreme heat that Mr. Ray
8 created in that tent.

9 All but one of the doctors who testified
10 in this case agreed on that point. You heard a lot
11 of medical testimony, but it boils down to this:
12 Dr. Lyon, who performed the autopsy on Kirby and
13 James, stayed with his conclusion that they died of
14 heat stroke. And his opinion has not changed.

15 Dr. Mosley, who performed the autopsy on
16 Liz Neuman, testified she died of prolonged
17 exposure to the heat. And his opinion has not
18 changed.

19 Dr. Cutshall -- Dr. Lyon also testified
20 that he performed the autopsy on James Shore and
21 that his cause of death was heat stroke. And his
22 opinion did not change.

23 Dr. Cutshall, the doctor from Flagstaff
24 who treated Liz Neuman, testified that he concluded
25 Liz died of heat stroke among other causes. And

1 his opinion has not changed. That's Liz Neuman's
2 medical record. Cause of death: No. 1, acute
3 renal failure; No. 2, anoxic brain injury; and,
4 No. 3, the DIC secondary to heat stroke. His
5 opinion did not change.

6 Dr. Dickson, the doctor that the state
7 hired to look at the medical records and autopsy
8 report for the three victims and to look at all the
9 medical records for all 18 patients, concluded that
10 Kirby, Liz and James all died of heat stroke or as
11 a result of the heat. And his opinion did not
12 change.

13 Dr. Paul, the doctor hired by the
14 defense, testified he was not saying that the
15 victims did not die from heat stroke but that he
16 cannot rule out organophosphates because there was
17 no testing. Dr. Paul conceded that he would have
18 to conclude that Kirby, James and Liz died of heat
19 stroke if he had documented temperatures of 104,
20 105 or above.

21 So where does that leave you, the fact
22 finders, who must find beyond a reasonable doubt
23 that Mr. Ray's conduct caused the deaths of the
24 three victims?

25 Five doctors testified in this case.

1 Four of the five say the victims died as a result
2 of exposure to Mr. Ray's heat event, the sweat
3 lodge. And the last doctor, Dr. Paul, the one
4 hired by the defense, says he's not ruling out heat
5 stroke and would agree it's heat stroke if he had
6 the documented core temperature of 105 degrees
7 Fahrenheit.

8 MR. LI: Your Honor, I'm going to object. It
9 misstates the testimony.

10 THE COURT: Ladies and gentlemen, you must
11 rely on your own recollection as to the testimony
12 in this case and the evidence in this case.

13 MS. POLK: In other words, if Dr. Paul had
14 proof that the temperature of the victims was 105
15 or above, then all those doctors would be in
16 agreement that the victims died of heat stroke.

17 Let's take a look, then, at the issue of
18 temperature. There is clearly evidence that the
19 temperature of all three victims was at least 105
20 degrees before they cooled down. All the doctors
21 testified that heat stroke occurs when the body's
22 temperature rises to 104, 105 degrees or above.

23 They further testified that to diagnose
24 heat stroke a documented core temperature is useful
25 but not required. In fact, most often the medical

1 examiners will not have that documented core body
2 temperature because rescuers have done everything
3 possible to save that person's life by lowering the
4 patient's temperature as rapidly as possible. Or
5 sometimes you won't have that core temperature
6 because, as in the case of border crossers where
7 you have only skeletonized remains, you don't have
8 the ability to get that core temperature.

9 So the elevated core temperature is a
10 diagnostic criteria, but it does not have to be
11 documented in the medical records and oftentimes it
12 is not. Most often doctors and medical examiners
13 look to the circumstances to determine whether that
14 core temperature was elevated.

15 When Dr. Paul testified, he agreed that
16 you don't have to have a documented core
17 temperature to have heat stroke and that you look
18 to the surrounding circumstances to conclude that
19 the patient had that requisite core temperature of
20 104 or 105 or above.

21 Now, Mr. Li in his opening had drawn up
22 on the easel these two things: Elevated
23 temperature and dehydration. We agree that you
24 have to have that elevated temperature to have heat
25 stroke. That elevated temperature does not have to

10

1 be documented in the records because more often
2 than not you're not going to get that core
3 temperature of a victim of heat stroke because of
4 rescue efforts to bring the temperature down.

5 In fact, Dr. Paul told you he has done 10
6 to 12 autopsies where he diagnosed heat stroke.
7 But all but one were border crossers and that he
8 never ever had that documented core temperature for
9 heat stroke.

10 In this case, like Dr. Paul's cases, we
11 do not have a documented core temperature. But we
12 do have circumstantial evidence that the three
13 victims clearly suffered high core temperatures as
14 high as 105 or above. We do not have direct
15 evidence of the core temperature of the three
16 victims. But just as Dr. Paul testified, he has
17 never had documented evidence of the core
18 temperature of all the autopsies of border crossers
19 that he did. And just as medical examiners and
20 doctors frequently will not have, because the first
21 priority is to save lives by cooling the patient,
22 not by trying to get that rectal temperature.

23 This is where the law says you can look
24 to the circumstances to decide a fact. You are not
25 limited to direct evidence.

1 On page 3 of your jury instruction you
2 have an instruction that talks about direct and
3 circumstantial evidence. This instruction says
4 that the law makes no distinction between direct
5 and circumstantial evidence. I'm going to read the
6 instruction. It says, evidence may be direct or
7 circumstantial. Direct evidence is the testimony
8 of a witness who saw, heard or otherwise observed
9 an event. Circumstantial evidence is the proof of
10 a fact or facts from which you may find another
11 fact.

12 The law makes no distinction between
13 direct and circumstantial evidence. It is for you
14 to determine the importance to be given the
15 evidence regardless of whether it is direct or
16 circumstantial.

17 In other words, from all the surrounding
18 facts in this case, you can find by circumstantial
19 evidence that the victims had that core temperature
20 necessary for heat stroke.

21 I just want to give you a quick example
22 of what direct evidence is versus circumstantial
23 evidence. Here in this courtroom if we had a
24 window looking outside and it started to rain, we
25 could all see that it was raining. That would be

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1 direct evidence.

2 But here in this courtroom where we do
3 not have a window looking outside, if all of a
4 sudden we heard thunder and the door opened and a
5 woman came in with a rain coat dripping with water,
6 and with an umbrella that was dripping with water
7 and she shook it off, that would be circumstantial
8 evidence that it was raining outside. You wouldn't
9 see the rain, but you would have circumstantial
10 evidence that it was, in fact, raining outside.
11 And the law makes no distinction between
12 circumstantial and direct evidence.

13 Let's examine the facts here to determine
14 whether it supports for the conclusion by four of
15 the five doctors in this case that the three
16 victims died of heat exposure or heat stroke.

17 Several doctors testified how your body
18 will cool nicely within an hour when removed from
19 the heat. Dr. Dickson explained that the body
20 works really hard to maintain a temperature of 98.6
21 and that when participants came out of that
22 superheated tent into an ambient air temperature of
23 about 70 degrees, that the air temperature alone
24 would be a significant factor in cooling them down.

25 Dr. Paul testified that a body will cool

1 about 11 degrees per hour with aggressive cooling
2 such as ice baths. But he would not allow himself
3 to be pinned down by Mr. Hughes on fast one would
4 cool when taken out of Mr. Ray's hot tent and into
5 the air that was at least 25 degrees cooler,
6 70 degrees, 25 degrees cooler than the temperature
7 of your body trying to get to 98.6.

8 Now, for Kirby Brown and James Shore, you
9 know that there are no recorded temperatures. The
10 EMTs, however, testified that they found James
11 Shore and Kirby Brown with their clothes removed,
12 and the EMTs could not remember if the ground
13 around Kirby and James was wet.

14 Detective Diskin testified, you will
15 recall, that the area on the outside of the tent
16 where Kirby and James had been worked on was muddy
17 the next day when he was on scene.

18 For Liz there was a recorded temperature
19 from her armpit of 97.5 at 6:25, which is more than
20 an hour after 9-1-1 was called. And Dr. Paul, the
21 defense doctor, testified that a temperature taken
22 from under the arm is not a reliable gauge of a
23 person's core temperature and that it will be about
24 two degrees lower than a person's core temperature.

25 Dr. Paul agreed that working off of that

1 armpit temperature, Liz's core temperature was at
2 least 99.5 at 6:25, more than an hour after 9-1-1
3 had been called, more than an hour after she had
4 been removed from the hot tent.

5 MR. LI: Again misstates the testimony.

6 THE COURT: Ladies and gentlemen, you've been
7 told several times, of course, that what the
8 lawyers say is not evidence. You have to determine
9 what the evidence, what the testimony, has been.

10 Ms. Polk, you may continue.

11 MS. POLK: Thank you, Your Honor.

12 Dr. Paul also agreed that if Liz had been
13 wetted down and her armpit was wet, the temperature
14 from the armpit would not be reliable at all. And,
15 finally, again, that temperature under Liz's armpit
16 was taken more than an hour after 9-1-1 was called.

17 Using Dr. Dickson's opinion that a body
18 will cool down nicely when the air temperature is
19 70 degrees, and with a breeze will cool as much as
20 11 degrees in an hour, you can see that Liz easily
21 could have cooled down six degrees from 105 to 99.5
22 in that hour.

23 The defense tried to cast doubt that Liz
24 was hot when she came out of the tent by arguing to
25 you that Dr. Nell Wagoner, the gynecologist from

1 Alaska, had testified that she touched Liz
2 immediately right after she emerged from the sweat
3 lodge and that she was cold.

4 You have a jury instruction on page 3
5 that says, lawyers comments are not evidence. And
6 it says, in the opening statements and closing
7 arguments, the lawyers talk about the law and the
8 evidence. What the lawyers say is not evidence,
9 but it may help you to understand the law and the
10 evidence.

11 It is simply not what the witness,
12 Dr. Wagoner, testified to. She did not testify
13 that she immediately went to Liz and touched her
14 and that she was cold.

15 Here's what Dr. Wagoner testified to:
16 She testified that when this heat event was over,
17 she saw four people unconscious in the tent. She
18 told you that she tried to drag a woman out but
19 could not. And she told you that she then assisted
20 in dragging another woman out, who was also
21 unconscious, and pulled that woman straight out the
22 entrance and left her there.

23 By the way, remember how Dr. Wagoner
24 testified at her shock at how much hotter the back
25 part of that sweat lodge was as she circled and

1 tried to pull people out?

2 Dr. Wagoner testified that is once she
3 was outside, she put the unconscious woman down and
4 turned to the Dream Team members and said, there
5 are people unconscious. They can't get out, and
6 they need help.

7 Dr. Wagoner described for you how hot and
8 weak she felt, how she laid down in the field about
9 20 feet from the tent and that someone poured water
10 on her from a container. Dr. Wagoner told you that
11 with the cooler air temperature and that water,
12 she, Dr. Wagoner, cooled down quickly and began to
13 feel chilly.

14 Dr. Wagoner testified that at some point
15 she tried to get up, and someone told her to stay
16 down and not to get up yet. She told you that
17 somebody else brought her electrolytes to drink.
18 And then Dr. Wagoner told you then, when she was
19 finally ready to get up, someone told her to go to
20 her room, but at that point she looked around and
21 saw people in distress.

22 That's when Dr. Wagoner testified she law
23 Liz lying there close to the tent with no one
24 tending to her. Dr. Wagoner told you Liz was
25 breathing but would not respond. And, finally,

1 Dr. Wagoner told you that when she touched Liz, her
2 skin was cold. Dr. Wagoner told you that Liz had
3 been hosed down. And Dr. Wagoner told you that she
4 was with Liz, she thinks, for about 30 minutes
5 before the paramedics arrived.

6 Now, the defense showed you some
7 photographs from 2008 and pointed to these people
8 and said that they do not look cold, suggesting
9 that if in 2008 participants didn't look cold, that
10 in 2009 perhaps they were already cool. But think
11 about this: Mr. Ray's event in 2008 was held in
12 September, a full month earlier than the event
13 in 2009, which was held in October. And there is a
14 significant air temperature difference from
15 September to October.

16 And the other thing about these
17 photographs is look at how much water is on the
18 ground. Melinda Martin and Jennifer Haley, the
19 Dream Team members, both testified about how all
20 the Dream Team members and the Mercers were cooling
21 off everyone who came out of the sweat lodge
22 in 2009 as fast as they could with the hoses and
23 with the buckets of water.

24 Finally, on this issue of the core
25 temperature of the three victims, Dr. Dickson, who

1 looked at all the records of all the patients and
2 all the records of the three victims, testified
3 that all three patients had suffered from heat
4 stroke or died as a result of the heat.

5 So to summarize this issue of
6 temperature, you have four out of five doctors
7 saying death is due to the heat. Looking at the
8 circumstantial evidence, you heard and saw
9 from 2008 photographs how much water was sprayed in
10 the area and how aggressively the efforts were to
11 cool down people.

12 You heard Mr. Ray's own words that as
13 they come out of the sweat lodge, they will be
14 sprayed with water. You heard testimony from
15 Dr. Dickson who said the area around Kirby and
16 James was still muddy the next day. You heard
17 Dr. Dickson testify that when you come out of a
18 heated environment to an ambient temperature of
19 70 degrees, 25 degrees cooler than the temperature
20 that your body wants to get to, your body on its
21 own will start cooling.

22 And the first recorded temperature we
23 have for Liz is more than an hour after the 9-1-1
24 call was made. You have the fifth doctor,
25 Dr. Paul, who has admitted that in the 10 to 12

1 autopsies that he has done where he diagnosed heat
2 stroke, he never had a documented core temperature.
3 Now, the second area where Dr. Paul had
4 difficulty agreeing with the other four doctors was
5 that the victims died as a result of the heat but
6 he determined that not all the patients had
7 suffered from dehydration.

8 First, it's not clear that all three were
9 not dehydrated when they came out of the sweat
10 lodge. You heard a lot of testimony from the
11 doctors that patients could have been rehydrated by
12 aggressive rehydration efforts of the emergency
13 responders. And Liz Neuman's medical records, for
14 example, say she was treated for dehydration.

15 Second, it doesn't matter. It doesn't
16 matter because dehydration is not a required
17 diagnostic criteria for heat stroke, either classic
18 heat stroke or nonexertional heat stroke. As all
19 the doctors told you, dehydration is useful
20 information in diagnosing heat stroke, but it is
21 not a required criteria.

22 Only Dr. Paul, the defense doctor, makes
23 the distinction between exertional and
24 nonexertional heat stroke. And only Dr. Paul says,
25 you do not have to have dehydration for heat

1 stroke, but you do have to have dehydration for
2 nonexertional heat stroke.

3 That position, ladies and gentlemen, is
4 not supported by Dr. Paul's own organization, as
5 you saw, the National Association of Medical
6 Examiners, Dr. Paul's professional organization.
7 That position is not supported, as you saw, by any
8 of the literature produced by Dr. Paul or Ms. Do
9 and Mr. Hughes and produced here in court.

10 MR. LI: I'm going to object again,
11 Your Honor, to the state's testimony. All the
12 doctors said that dehydration was a component.

13 THE COURT: Ladies and gentlemen, what the
14 attorneys say in argument -- what's attorneys say
15 is not evidence.

16 Ms. Polk.

17 MS. POLK: Thank you.

18 All of the doctors said that dehydration
19 is useful information. The four doctors that
20 testified, not Dr. Paul, but the four doctors, and
21 the medical literature, does not require
22 dehydration to diagnose heat stroke and
23 nonexertional heat stroke.

24 Dr. Dickson, who has treated, as he told
25 you, hundreds of heat-stroke patients, says it's

1 not a required finding. And Dr. Mosley testified
2 that you can have a well-hydrated person die of
3 heat stroke in a nonexertional setting such as a
4 hot car in Phoenix.

5 Dr. Paul also testified that without
6 testing, he cannot rule out the possibility that
7 the patients died of organophosphate poisoning.
8 And while Dr. Mosley, Dr. Lyon, Dr. Cutshall all
9 agreed on cross-examination that they theoretically
10 could not rule out the possibility of
11 organophosphates poisoning, they all testified that
12 their original conclusion that the patients died of
13 heat stroke remain.

14 MR. LI: Your Honor, Dr. Mosley did not
15 testify -- I'm very sorry. Dr. Mosley testified
16 that he believed now that it was toxins.

17 Objection. Misstates the testimony.

18 MS. POLK: Your Honor, may we approach?

19 THE COURT: Yes, you may.

20 (Sidebar conference.)

21 THE COURT: Go ahead.

22 MS. POLK: This is absolutely uncalled for.
23 Mr. Li should not be interrupting me. The records
24 is what I am saying. And Mr. Li in his rebuttal or
25 in his closing, he pulled out little excerpts here

1 and there out of context is not sufficient -- is
2 not basis for him to keep interrupting.

3 The totality of the evidence is that
4 Dr. Mosley stayed with his opinion that they died
5 of heat stroke.

6 MR. LI: That's not the case, Your Honor.
7 Dr. Mosley repeatedly said that after reading
8 Dr. Paul's report, he changed his opinion, that he
9 now believes toxins could be at work. We read it
10 directly from the transcript. That's what he said.
11 He said it repeatedly.

12 THE COURT: I think he stayed with his
13 original --

14 MR. LI: Your Honor, we can show you the
15 transcript.

16 THE COURT: This is argument, Mr. Li. And I
17 reminded the jury repeatedly at this time that
18 there has been four months of testimony. And if
19 you have something that's just absolutely definite,
20 that's one thing. But you clearly don't at this
21 time. And this is argument. I've reminded the
22 jury now three times, I think. This is the fourth
23 time.

24 So, Ms. Polk, you may continue.

25 MR. LI: Thank you, Your Honor.

1 (End of sidebar conference.)

2 THE COURT: Ms. Polk.

3 MS. POLK: Thank you, Your Honor.

4 Moving on to organophosphate poisoning.

5 Dr. Paul testified that without testing he cannot
6 rule out the possibility of organophosphate
7 poisoning. And while Dr. Mosley, Dr. Lyon and
8 Dr. Cutshall all agreed on cross-examination that
9 they theoretically could not rule out the
10 possibility of organophosphate poisoning, they all
11 testified that their original conclusion that the
12 three patients died of heat stroke or exposure to
13 heat remains.

14 You heard Dr. Dickson testify that the
15 idea of organophosphate poisoning is so farfetched,
16 so farfetched, that he is not even willing to agree
17 hypothetically that the victims died of
18 organophosphate poisoning.

19 This was questioning that occurred on
20 May 11, 2011, on page 146 of the transcript. It
21 was a question by Ms. Do.

22 So can you concede the possibility that
23 perhaps one doctor against four, that one doctor is
24 wrong?

25 And the answer from Dr. Dickson: I still

1 don't see how it's one versus.

2 And then the question from Ms. Do:

3 Hypothetically, hypothetically, you're the only one
4 with this conclusion that is different from
5 Dr. Cutshall, Lyon and Mosley.

6 And you will recall the answer from
7 Dr. Dickson when he said, hypothetically, pigs can
8 fly. I'm not going to concede that.

9 The state has the burden of proving that
10 Mr. Ray is guilty beyond a reasonable doubt. On
11 page 5 of your jury instructions is the instruction
12 about reasonable doubt. And it states that the
13 state has the burden of proving Mr. Ray guilty
14 beyond a reasonable doubt. This means the state
15 must prove each element of each charge beyond a
16 reasonable doubt.

17 In civil cases it's only necessary to
18 prove that a fact is more likely true than not or
19 that it's truth is highly probable. In criminal
20 cases such as this, the State's case must be more
21 powerful than that. It must be beyond a reasonable
22 doubt.

23 Proof beyond a reasonable doubt is proof
24 that leaves you firmly convinced of the defendant's
25 guilt.

1 And here's what this instruction says:
 2 There are very few things in this world that we
 3 know with absolute certainty. And in criminal
 4 cases the law does not require proof that overcomes
 5 every doubt. If, based on your consideration of
 6 the evidence, you are firmly convinced that Mr. Ray
 7 is guilty of the crimes charged, you must find him
 8 guilty.

9 If, on the other hand, you think there is
 10 a real possibility that Mr. Ray is not guilty, you
 11 must give him the benefit of the doubt and find him
 12 not guilty.

13 Think about that for a moment. The
 14 language that there are few things in this world
 15 that we know with absolute certainty. And in
 16 criminal cases the law does not require proof that
 17 overcomes every doubt. To doubt is human. There
 18 are few things in this world that we know with
 19 absolute certainty. And you do not need to find
 20 proof to an absolute degree of certainty.

21 The question is whether the doubt is
 22 reasonable. Doubt based on speculation is not
 23 reasonable doubt. Doubt based on hypotheticals
 24 that assumes facts that are not true is not
 25 reasonable doubt.

1 Doubt based on the opinion of Dr. Paul,
 2 who admitted he knows very little about
 3 organophosphates, who admitted he has never treated
 4 a patient for -- a live patient for organophosphate
 5 poisoning, who admitted he has never performed an
 6 autopsy on a patient who died of organophosphate
 7 poisoning, is not reasonable doubt. Doubt based on
 8 a house of cards where every card is a joker is not
 9 reasonable doubt.

10 Now, the defense provided an article that
 11 is Exhibit 1008. And it's called "Goldfrank's
 12 Toxicological Emergencies." And in this article
 13 you were read some passages about a study performed
 14 by the American Association of Poison Control
 15 Centers. And in this article it says that that
 16 study noted that the American Association of Poison
 17 Control Centers received over 5,000 calls in five
 18 years about exposure to organophosphates and
 19 another 25,000 calls about carbamates. So that is
 20 80,000 calls in a five-year period in the
 21 United States regarding exposure to
 22 organophosphates and to carbamates.

23 Those calls are people spraying their
 24 roses, applying weed killer to their lawns,
 25 spilling it on themselves, spilling it on their

1 kids, kids get into the pesticides, getting these
 2 compounds on their skin or in their eyes, to a
 3 degree that causes them enough concern that they
 4 call the American Association of Poison Control
 5 Centers.

6 That figure of 80,000 calls in a
 7 five-year period also arguably includes those who
 8 intentionally ingested organophosphates to commit
 9 suicide. And when you read this article, because
 10 it in evidence, you will also read that those
 11 statistics apply to a five-year period from 1988 to
 12 2002. And you will read the following: Although
 13 those totals are large, the number of reported
 14 organic phosphorus compound exposures reported to
 15 the American Association of Poison Control Centers
 16 in the last two years of this period declined by
 17 almost 20 percent, perhaps owing to the mass
 18 marketing and use of less toxic pesticides.

19 In five years, according to this study, 8
 20 people out of 80,000 exposures died, including
 21 possibly suicide attempts.

22 MR. LI: Your Honor --

23 MS. POLK: -- prove in this case that three
 24 people died at Angel Valley, not due to their
 25 exposure to extreme heat and humidity but to a

1 pesticide that had been sprayed on the ground.

2 MR. LI: Your Honor, may we approach?

3 THE COURT: You may.

4 (Sidebar conference.)

5 MR. LI: This is demonstrably untrue. The
 6 actual the article says 8 a year. Counsel first
 7 said 5,000 total exposures. It's 55,000 exposures.
 8 Counsel is saying 8 total. It's 8 a year. And
 9 that's an average. And that average has remained
 10 constant.

11 THE COURT: Ms. Polk.

12 MS. POLK: If I said 5,000, I meant to say
 13 50,000. I'll correct that. But it's 8 deaths in
 14 that five-year period.

15 MR. LI: It's 8 a year.

16 THE COURT: And there is an exhibit here. And
 17 that's what the source is is an exhibit; correct?

18 MR. LI: Correct, Your Honor.

19 THE COURT: Thank you.

20 (End of sidebar conference.)

21 THE COURT: Ms. Polk.

22 MS. POLK: Let me just make sure I read that
 23 article correctly. I'm told I said 5,000 instead
 24 of 50,000. The information from the article is
 25 50,000 calls due to organophosphates in the

1 five-year period with another 25,000 calls
2 concerning the carbamates and that on average 8
3 people per year succumbed.

4 Moving on. Dr. Mosley testified that he
5 would expect everyone in that tent to have suffered
6 from the same symptoms if the cause was
7 organophosphate poisoning. And on May 6 of 2011,
8 on a question from Mr. Hughes, the question was:
9 The signs and symptoms that are on that list that
10 we talked about are present for one person who went
11 to the hospital and not present for others who went
12 to the hospital. What would that tell you as far
13 as whether there was organophosphate poisoning?

14 And Dr. Mosley testified: I would expect
15 in a situation where multiple people are in the
16 same environment, if they're having -- I would
17 expect them to have similar symptoms and to fit the
18 symptoms into the features of the organophosphate
19 toxidrome. Well, it's an imperfect fit.

20 Dr. Lyon testified that he had never seen
21 anything in his examination of either Kirby Brown
22 or James Shore to lead him to believe that either
23 had been exposed to organophosphate poisoning.

24 And Dr. Dickson testified that while some
25 of the signs and symptoms for organophosphate

1 poisoning might overlap, these patients did not
2 have signs and symptoms that fit in the box for the
3 toxidrome for organophosphate poisoning.

4 Dr. Dickson testified, okay -- and this
5 is in cross-examination by Ms. Do. I don't want to
6 play semantics. This is the question from Ms. Do:
7 I don't want to play semantics. My question to you
8 is, is it now your testimony that miosis, pinpoint
9 pupils, and foaming is consistent with
10 organophosphates as well as heat illness?

11 And Dr. Dickson said, yes.

12 And the question from Ms. Do was: Okay.
13 So since it's consistent with organophosphates as
14 well as heat illnesses, you can't really testify,
15 Doctor, that all signs and symptoms are all
16 inconsistent with organophosphates; correct?

17 And Dr. Dickson said, well, yes, I can.
18 Because it's a big picture that comes down to it,
19 if you look at it, it's like looking at one little
20 speck of the big picture.

21 And then he testified, and what we
22 discussed thoughtfully a little while ago was that
23 what kills people with organophosphate poisoning --
24 and that's what we're talking about, people that
25 are dying or really, really sick. And that's

1 because they, essentially, drown. And a few
2 questions later, he said, these people didn't have
3 those symptoms.

4 Dr. Dickson further testified, and when I
5 look at these cases, we have several cases of
6 people that lived and died -- and I'm sorry -- that
7 lived and died that were stuck on their back with a
8 mask on their face. Now, if you've got a mouthful
9 of water and that's going to keep going, you're
10 going to kill these patients. You're not going to
11 help them. And that's the big difference.

12 I go back to the literature. This is a
13 clinical diagnosis. You have to look at clinically
14 what the presentation was. And these people didn't
15 have those symptoms.

16 Dr. Dickson lives and works in Yuma, both
17 a hot place to live and a place with numerous
18 pesticides -- numerous farms where pesticides are
19 used. Dr. Dickson told you he has treated people
20 with heat stroke, hypercapnia, which is the carbon
21 dioxide poisoning, and with organophosphate
22 poisoning.

23 On May 10 Dr. Dickson told you the
24 following: This is a question from Mr. Hughes: Do
25 you have any idea how many patients you've treated

1 that have suffered from some sort of heat-related
2 illness?

3 Dr. Dickson said, probably 20 to 30 that
4 I personally see a year, a summer.

5 And of those do you have any idea how
6 many patients you've seen that have suffered from
7 nonexertional heat stroke?

8 And Dr. Dickson said, probably I'd say a
9 third of those.

10 Mr. Hughes then asked, have you ever
11 treated a patient for hypercapnia, which is the
12 poisoning due to carbon dioxide?

13 And Dr. Dickson said, yes.

14 And the question from Mr. Hughes was, do
15 you have any idea how many you've treated?

16 And Dr. Dickson said, probably in the
17 hundred range, hundred or 200 range. It's a pretty
18 common problem.

19 And then Mr. Hughes asked, have you ever
20 treated patients for exposure to organophosphates?

21 Dr. Dickson said, yes.

22 And Mr. Hughes said, do you have any idea
23 how many you've treated?

24 And Dr. Dickson said, probably -- it's
25 not that frequent. But we do have a lot of farming

1 in our community. So probably about 10, I'd say.

2 And Mr. Hughes said, is that 10 per year
3 or 10 total?

4 And the answer was, probably 10 total.

5 The only doctor in this case who has
6 treated live patients for organophosphate poisoning
7 has rejected wholesale the notion that
8 organophosphates caused the deaths of the three
9 victims. And not a single doctor who testified in
10 this case has ever seen a patient who has died of
11 organophosphate poisoning or done an autopsy on a
12 patient who has died of organophosphate poisoning.

13 And for Dr. Dickson, not even the most
14 serious case he ever treated resulted in death.

15 Dr. Dickson testified in response to a
16 question from Mr. Hughes, and, Doctor, you
17 testified, I believe, towards the beginning of your
18 testimony today that you had actually seen patients
19 in your emergency department who had been exposed
20 to organophosphates.

21 Dr. Dickson said, yes, I have.

22 Mr. Hughes asked, have you ever had a
23 patient who actually died from organophosphates?

24 Dr. Dickson said, I have not.

25 Mr. Hughes asked, have you ever seen a

1 patient who was critically ill from
2 organophosphates?

3 And Dr. Dickson said, generally, no. In
4 today's environment the concentrations are pretty
5 low. So mostly it's a drooling. And we treat it
6 with atropine. And one or two doses normally
7 solves the problem. There is in the literature
8 people who take massive amounts of medication and
9 another antidote. I've never seen a patient that
10 has gone that far.

11 Mr. Hughes asked, how about the patients
12 you testified you've seen who were the farm workers
13 working with industrial organophosphates? Have you
14 seen any of them who are critically -- even
15 critically ill?

16 And Dr. Dickson said, no.

17 Mr. Hughes asked, and then you mentioned
18 military personnel who had -- did you say a crop
19 duster dropped organophosphates on them?

20 And Dr. Dickson said, correct.

21 And Mr. Hughes said, did you see any of
22 them that were critically ill?

23 And the answer from Dr. Dickson was, no.
24 Just drooling was the most that I saw. And then
25 one or two doses of atropine, and they were better.

1 Dr. Dickson also was asked on May 5 from
2 Mr. Hughes, and you mentioned you heard about it in
3 medical school. Have you ever in your practice,
4 both as a medical student or resident or in your
5 fellowship or in your professional career since
6 then -- have you ever actually seen a patient who
7 has died from organophosphates?

8 And the answer from Dr. Mosley was, no.

9 Dr. Dickson then went on to rule out
10 organophosphate poisoning as a potential cause of
11 death in this case.

12 This, again, was a question from
13 Mr. Hughes: In reaching your determination as to
14 the cause of death of Ms. Neuman, Ms. Brown and
15 Mr. Shore, did you consider whether other factors,
16 such as organophosphates, could have played a role?

17 And the answer from Dr. Dickson was,
18 again, when you go through the medical records,
19 those doctors, as I said earlier, did a good job.
20 When you have a patient like that, you need to look
21 through all the different causes. And they
22 considered it. And they gave good reasons why it
23 wasn't evidence of the -- what -- they're called
24 "toxidromes."

25 The other things, like cholinergic or

1 organophosphates, anticholinergic, carbon monoxide
2 poisoning, drugs -- they looked or attempted to
3 treat any of those and, basically, checked off that
4 they ruled them out.

5 You have had played for you many times
6 the audio clip, the background information in the
7 dining hall on the evening of October 8 when the
8 detectives were doing their interviews. You have
9 heard several times somebody on that audio clip
10 say, well, maybe it was carbon monoxide with maybe
11 some organophosphates mixed in.

12 But you just heard from Dr. Dickson that
13 when he reviewed all the medical records pertaining
14 to all 18 patients, he saw that the doctors had
15 considered all of those possibilities -- the
16 cholinergic, the anticholinergic -- and all of the
17 doctors after considering it have ruled it out.

18 In spite of all that testimony, the
19 defense still asks that you go back to the night of
20 October 8, that you hand pick isolated signs and
21 symptoms that would be consistent with
22 organophosphate poisoning but that overlap with
23 heat stroke, that you second guess all the doctors
24 and that you conclude on your own that you cannot
25 rule out the possibility of organophosphate

1 poisoning.

2 This is pure speculation. And it
3 requires you to ignore everything the doctors did
4 that night and the testimony of the doctors who
5 testified that in order to find organophosphate
6 poisoning, all the signs and symptoms need to fit
7 neatly in the box, in the toxidrome.

8 I want to talk just briefly about those
9 boxes, those mnemonics, that you saw throughout
10 this trial -- the SLUDGEM and the DUMBELLS. First,
11 consider what the purpose of those mnemonics is.

12 This is a question on May 6 from
13 Mr. Hughes to Dr. Mosley: Can you tell us again
14 what the mnemonic is meant to do. Why was -- why
15 does it exist?

16 And Dr. Mosley responded, to help ER
17 doctors, MDs or doctors recognize it as a syndrome.
18 You might not suspect it unless you -- and the
19 quicker you realize it, the better off the patient
20 is. It's the constellation of the symptoms that
21 should trigger a doctor treating a patient to think
22 about it.

23 Second, consider that the testimony in
24 this case has been that no patient had that
25 constellation of signs and symptoms that fit neatly

1 in the box to indicate organophosphate poisoning.

2 This is a question of Mr. Hughes of
3 Dr. Dickson: Mr. Hughes asked, did any of the 18
4 patients who went to the hospital -- do you know
5 whether any of them exhibited signs and symptoms
6 consistent with a cholinergic or an anticholinergic
7 toxidrome?

8 And Dr. Dickson responded, nobody fell
9 into that category. We talked a little bit
10 earlier. Some people, some of their symptoms could
11 be partly cholinergic. Some of their symptoms can
12 be anticholinergic. But when you have a toxidrome,
13 you need to put them into the box. And nobody fell
14 into any of those boxes. So no.

15 Dr. Dickson testified, there is simply no
16 way a treating doctor would ever confuse an
17 organophosphate poisoning with heat stroke. He
18 explained to you that a person suffering from
19 organophosphate poisoning would have fluids pouring
20 from every possible orifice and that the patient
21 dies by drowning in their own spit.

22 This is consistent with the article
23 provided by Dr. Paul to Ms. Do and Mr. Hughes.
24 And, again, this is the Exhibit 1008, the
25 Goldfrank's article.

1 I'm going to read from page 1508, a
2 summary of the article, where it's written,
3 secretions from every orifice may become copious
4 and hinder resuscitation efforts, and ask you to
5 think about all the evidence in this case. And did
6 one, single first responder; one, single EMT; one,
7 single doctor ever talk about secretions from every
8 orifice that were so copious that they hindered
9 their resuscitation efforts?

10 Dr. Paul's opinion has no credibility for
11 10 reasons. First of all, heat stroke is outside
12 of his area of expertise. He has never treated a
13 patient for heat stroke. He's never treated a live
14 patient for heat stroke.

15 Dr. Paul has done 10 to 12 autopsies on
16 patients where he concluded heat stroke. And in
17 all of those cases, he had no documented
18 temperature and he had no documented dehydration.

19 Organophosphate poisoning is outside of
20 the area of expertise of Dr. Paul. Again, he has
21 never treated a live patient with organophosphate
22 poisoning. He's never done an autopsy on a patient
23 with organophosphate poisoning. His colleagues
24 have never done an autopsy on a patient with
25 organophosphate poisoning.

1 Dr. Paul testified that he talked to a
2 colleague in another state -- I believe it was
3 Kentucky -- who once did an autopsy on a patient
4 who worked in the tobacco fields with nicotine
5 poisoning after prolonged exposure to tobacco.

6 Toxicity, by Dr. Paul's own admission, is
7 outside of his area of expertise. He told you he
8 had no idea what level of toxicity it would take to
9 even cause a death due to organophosphate
10 poisoning.

11 Dr. Paul told you he did consult with a
12 toxicologist, about this case, who did not suggest
13 to him any organophosphate compound that could have
14 caused the deaths.

15 Dr. Paul has a wonderful resume. I'm not
16 suggesting otherwise. But his opinion in this case
17 has no credibility.

18 Again, I'll remind you of the
19 cross-examination of Dr. Dickson by Ms. Do when she
20 tried to, essentially, pressure him into agreeing
21 that hypothetically organophosphates could have
22 caused the deaths by calling him an outlier. This
23 is not 5th grade. This is not medicine by peer
24 pressure.

25 Yes. Three of them agreed that

1 hypothetically they could not rule out
2 organophosphates due to the overlapping symptoms.
3 And they were asked, if someone told you that
4 organophosphates was suspected, would you test for
5 it? But, again, you can get a witness to agree to
6 a lot of questions if you give them hypotheticals.

7 The problem with hypotheticals is they
8 ask a witness to ignore the actual evidence and
9 assume that if something else were true, then what
10 would their answer be. Dr. Dickson, again, the
11 only doctor who has ever treated organophosphate
12 poisoning, would not even hypothetically allow that
13 organophosphates could have caused the three deaths
14 in this case.

15 I'm going to talk briefly about the issue
16 of testing. The defense has told you in this case
17 that the state did not preserve samples from the
18 victims. That's false. The MEs told you they
19 preserved blood samples and that the samples were
20 equally available to all parties for testing.

21 In fact, when the state learned on
22 January 31 when we interviewed -- of this year when
23 we interviewed Dr. Paul, that he could not
24 eliminate organophosphates due to the absence of
25 testing, what did we do? We tested.

1 Now, you learned in this trial that
2 Dr. Paul was retained in May of 2010 and that he
3 formed an opinion then, that his opinion did not
4 change between May of 2010 and January of 2011, the
5 date of his report. And he told you he did not put
6 in his report the opinion he gave you from the
7 stand, that organophosphates, in his opinion,
8 needed to be eliminated by testing. Dr. Paul told
9 you the reason he did not put his conclusion
10 concerning organophosphates in the report was that
11 he did not have the medical records of one of the
12 18 patients, Stephen Ray.

13 But on January 31, when the state first
14 learns from Dr. Paul of his opinion, that he
15 couldn't eliminate organophosphates because they
16 weren't tested for, what did we do? Did we put our
17 heads in the sand and refuse to follow the
18 evidence? No.

19 Detective Diskin testified about what we
20 did. Detective Diskin had a conversation with the
21 medical examiner from Coconino County, Dr. Mosley,
22 and asked if he would send the sample of Liz Neuman
23 for testing of organophosphates compound.

24 Detective Diskin told you he had a
25 conversation with Dr. Lyon and asked the same

1 thing. Off went the samples to the labs, to AIT,
2 and MNS, the private labs.

3 Dr. Mosley told you that he told
4 Detective Diskin that testing for organophosphates
5 in the blood could be useful because if the test
6 came out positive, it would tend to suggest the
7 presence of organophosphates.

8 So the samples were tested. And what
9 were the results? As you heard from the stand, the
10 results were negative. The samples came back
11 negative, no organophosphates in those samples.

12 Then the state learned from the labs that
13 those results may not be reliable. And what did we
14 do with that information? Within two working days
15 we sent a letter, as you heard, to the defense
16 telling them we had learned that that test may not
17 be reliable.

18 Now, the defendant and the defense has no
19 obligation to test. But these blood samples have
20 been equally available to the parties.

21 A second issue about this testing for
22 organophosphates is that there simply is no good
23 test for organophosphate presence. And that's
24 whether it's then or 14 months later.

25 Again, you heard the suggestion from

1 somebody, an unknown person, in that audiotape. An
2 EMT? A paramedic? A fire fighter? A volunteer
3 with one of those organizations? No one knows. No
4 one knows because that person never came forward,
5 nor did his concern about organophosphates ever
6 make it to any doctor or to the detective. You
7 recall clearly that his statement was simply that
8 maybe it was carbon monoxide, which you know was
9 ruled out, or maybe with some organophosphates
10 mixed in.

11 But here's the simple facts: Over the
12 next few days, no doctor ever tested for
13 organophosphates because it was never indicated.
14 This notion that the patients could have died from
15 organophosphate poisoning is a complete red
16 hearing.

17 On their own, the very doctors who
18 treated the patients saw no indication of
19 organophosphate poisoning and did not order any
20 tests. As you heard, the doctors saw no clear
21 pattern that the signs and symptoms fit into the
22 toxidrome for organophosphate poisoning, either
23 cholinergic or anticholinergic. And, as you heard,
24 some patients fell in column A. Some patients fell
25 in column B.

1 But what you know from all the evidence
2 is that no doctor ever tested for organophosphates
3 because no doctor ever saw indications that such a
4 test would be necessary or useful.

5 Now, I want to talk about Stephen Ray's
6 medical records just briefly to show you how the
7 doctors from the Flagstaff Medical Center worked
8 with Arizona poison control to eliminate toxins
9 including organophosphates. What Dr. Dickson
10 explained to you, how the doctors called Arizona
11 poison control, is illustrated in these medical
12 records of Stephen Ray.

13 This is Exhibit 213, the medical records
14 of Stephen Ray. And this is page 701 -- 7091.
15 This is the emergency department encounter showing
16 the chief complaint, the altered mental status and
17 seizures. This record also shows down here at the
18 bottom no diaphoresis, which would be the excessive
19 sweating that you would expect with
20 organophosphates. Remember the pouring of fluids
21 from every orifice? Seven Ray had no such
22 excessive sweating. And you will see here it's
23 written, this particular patient was found with
24 acutely altered mental status, the hallmark of heat
25 stroke.

1 Now, page 7093 of Stephen Ray's medical
2 records shows you this: And this is medical
3 notations on Stephen Ray's records that Dr. Dickson
4 pointed you to when he testified. Because it
5 contains the thought processes of the doctors as
6 they rapidly worked trying to look at all possible
7 causes, eliminating and narrowing it in so they
8 could figure out what the appropriate treatment of
9 Stephen Ray was.

10 Keep in mind no patient, including
11 Mr. Ray, was ever treated for organophosphate
12 poisoning. This is the emergency department course
13 and medical decision making. Mr. Stephen Ray is a
14 46-year-old male presenting to the emergency
15 department for acute altered mental status. Given
16 the situation of the event, the differential
17 diagnoses -- and that, you will recall, are the
18 different possibilities that the doctors are
19 working with at the time. The differential
20 diagnoses at presentation included acute carbon
21 monoxide poisoning, acute cyanide poisoning, acute
22 anoxia, acute hypo -- hyperthermia and acute
23 toxidrome.

24 So in the beginning that's what they're
25 looking for, all of those possibilities, including

1 this toxidrome, in other words, the organophosphate
2 poisoning.

3 The patient was having seizures at the
4 time of presentation. Given this and his altered
5 mental status, I immediately made the decision to
6 intubate him for airway protection. This was
7 accomplished without any difficulty or
8 complication.

9 And remember, with organophosphate
10 poisoning the effort to intubate, according to
11 Goldfrank's, is often too difficult because of the
12 heavy secretions. But with Stephen Ray, no
13 problem. They intubated him. Again, completely
14 inconsistent with organophosphate poisoning.

15 Immediately a propofol drip was begun to
16 treat the patient's seizures. Once on propofol the
17 patient never showed any evidence of recurrent
18 seizure activity. Laboratory studies were
19 obtained. These were significant for an elevation
20 in the serum. Evidence -- or troponin. Evidence
21 of metabolic acidosis and an elevated white blood
22 cell count. Interestingly, the patient's carbon
23 monoxide level was zero, virtually ruling out
24 carbon monoxide poisoning.

25 You can see the thought process. They

1 start big. They eliminate. They narrow down.

2 Now, there was some evidence of
3 anticholinergic toxidrome. This included the
4 tachycardia, the hyperthermia and hypertension.
5 However, the patient has moist skin and pinpoint
6 pupils. This argued against it. The patient's
7 hemoglobin level was normal, which would be unusual
8 in the case of acute cyanide poisoning. Again,
9 eliminating.

10 I spoke at length with Dr. Boyer down at
11 the Arizona poison control. She suggested that
12 carbon monoxide poisoning was still a possibility,
13 that the patient may have just cleared at this
14 point.

15 After discussing Stephen Ray's case with
16 Dr. Boyer, now they're looking at carbon monoxide,
17 still trying to eliminate it. And then the doctor
18 says, I continued to believe that acute
19 hyperthermia and subsequent seizure was the most
20 likely cause of this patient's presentation given
21 the incident involving sitting in a hot sweat lodge
22 for a prolonged period of time.

23 After talking at length with Dr. Boyer
24 down at the Arizona poison control, the doctor was
25 not led to organophosphate poisoning. Instead,

1 things were eliminated and they're narrowing it
2 down. And this doctor continued to believe that
3 heat was the issue.

4 Now, this record for Stephen Ray does go
5 on. Upon discharge this is the assessment plan.
6 In here this doctor does say, this patient does not
7 appear to have heat stroke, and there is no
8 evidence of carbon monoxide poisoning. This
9 doctor, as you just saw, concluded no heat stroke.
10 And this doctor concluded acute renal failure,
11 likely related to his fasting state resolved with
12 rehydration. And then the headache.

13 Finally, however, when Mr. Ray was
14 discharged, his rehab diagnosis included the
15 reference to anoxia to the brain due to the very
16 hot and crowded sweat lodge.

17 Let me see if I can pull that up for you
18 here. This is page 7104 of Mr. Ray's medical
19 records. You can see here the rehab services. And
20 the directions include rehab services diagnosis.
21 Anoxia to the brain due to very hot and crowded
22 sweat lodge.

23 The relevance of the Stephen Ray records
24 is to help you see how early on EMTs, paramedics,
25 doctors -- they don't know what's happened. And as

1 many testified, as Detective Diskin testified, it
2 didn't occur to anybody at that time that somebody
3 would intentionally expose participants to such
4 extreme heat that they would suffer heat stroke.

5 These records show you that early on the
6 doctors are looking at everything, including the
7 toxidromes or organophosphate poisoning, that they
8 talked to Arizona poison control. And it's a
9 process of elimination, and they narrow, narrow it,
10 narrow it down.

11 The second point about organophosphate
12 testing is that there is no reliable diagnostic
13 test for organophosphates. Dr. Dickson told you
14 that. And, again, this exhibit provided by the
15 defense, Exhibit 1008, Goldfrank's Toxicologic
16 Emergencies, says the same thing. This is on
17 page 1504. And I have it highlighted where this
18 article says, unfortunately although urine and
19 serum assays for organophosphate compounds and
20 their metabolites are being investigated, such
21 testing is rarely obtainable within a few minutes
22 or hours. Moreover, normal ranges and toxic levels
23 are not established for most compounds.

24 Another useful research tool is the
25 measurement of the ACHE activity in neuronal

1 tissue. But this requires CNS or neuronal tissue
2 biopsies. And even then this test is not very
3 helpful unless the baseline activity is known.

4 Currently the only practical study for
5 verifying the cholinesterase in severe poisoning is
6 a measure of the cholinesterase activity in readily
7 accessible tissue, such as the plasma and
8 erythrocytes.

9 And that is, as you will recall,
10 consistent with what Dr. Dickson told you, how in
11 order in an emergency room to test for
12 organophosphate poisoning, it's only useful if you
13 know a baseline of the patient's readings, and it's
14 only useful if you continue to test over time. And
15 the purpose of the testing is to determine whether
16 or not the patient is actually responding favorably
17 to the atropine, to the treatment for
18 organophosphates.

19 Just a few words about that large exhibit
20 that the defense had up on my screen a few moments
21 ago that purports to display the key medical facts,
22 in Dr. Paul's words, about the patient's records.
23 Aside from the obvious that you've heard now over
24 and over again that the signs and symptoms that
25 Dr. Paul testified about are overlapping and

1 consistent with both heat stroke and
2 organophosphates, there are two facts that are
3 glaringly missing from that large exhibit.

4 First of all, that exhibit completely
5 left off the superheated environment in which the
6 patients spent two hours in searing heat and
7 humidity before they fell ill. And, second, that
8 exhibit left off the altered mental status that the
9 patients experienced, the hallmark of heat stroke.

10 And that large calendar that Mr. Li had
11 that he flipped through month after month. What
12 was missing from that large calendar? What was
13 missing were the hundreds of hours of interviews
14 that Detective Diskin testified that he had done,
15 all of which, as he testified, pointed him to not
16 some mysterious toxin but to the extreme nature of
17 Mr. Ray's heat event as the focus of his
18 investigation and the cause of death.

19 Let's just talk briefly about Dr. Dickson
20 and Dr. Paul. First of all, both of the state's
21 medical examiners, Dr. Lyon and Dr. Mosley, who did
22 the autopsy on the three victims, ruled heat stroke
23 and hyperthermia as a result of a prolonged
24 exposure to that sweat lodge.

25 So why did the state get another doctor?

1 Why did we go out and hire Dr. Dickson? The answer
2 is to have someone look at all the medical records
3 of all the patients, not just the three who passed
4 away. All three medical examiners, including
5 Dr. Paul, say that for heat stroke there is nothing
6 in the autopsy that indicates it. In other words,
7 it's a negative finding. You make your decision
8 based on the elimination of natural causes, the
9 elimination of trauma; and you look to the
10 environment where the patient was in before they
11 fell ill.

12 All the medical examiner can do in the
13 autopsy is rule out and then look to the
14 environment. Dr. Dickson, on the other hand,
15 specializes in diagnosing and treating illnesses in
16 live patients and examined all the medical records
17 in this case.

18 The only doctor who testified in this
19 case who has ever treated a patient for heat
20 stroke, a live patient for heat stroke, is
21 Dr. Dickson. The only doctor who testified in this
22 case who has ever treated a live patient for
23 organophosphate poisoning is Dr. Dickson.

24 None of the medical examiners -- not
25 Dr. Lyon, not Dr. Mosley or Dr. Paul -- have ever

1 treated a live patient for heat stroke. And none
2 of them have ever treated -- none of the medical
3 examiners have ever treated a patient for
4 organophosphate poisoning.

5 You heard Dr. Paul testify that the fact
6 that some patients had pinpoint pupils was a red
7 flag for him. But, in fact, as you saw on the
8 chart, only 4 out of 18 patients had pinpoint
9 pupils. And according to Dr. Mosley, that is
10 completely consistent with who actually died.
11 Because, in Dr. Mosley's opinion, they probably
12 suffered from lack of oxygen, causing the pinpoint
13 pupils.

14 On May 6 of 2011, Dr. Mosley testified as
15 following: From a question by Mr. Hughes, which
16 was, I think just before the break, you had
17 mentioned that you had heard from participants
18 that -- or from their reports that there may be
19 areas in the sweat lodge that had fresher air or
20 less fresh air?

21 And Dr. Mosley said, yes.

22 And Mr. Hughes said, and that explains --
23 or does it explain why some people presented to the
24 different hospitals with miosis and some people
25 didn't present with miosis?

1 And Dr. Mosley said, I think it would
2 account for that.

3 Mr. Hughes said, well, can you explain
4 that.

5 Dr. Mosley said, well, if someone has --
6 is in an area of the tent that has a higher level
7 of carbon dioxide, I would expect them to have
8 miosis, whereas a person who is getting fresh air
9 wouldn't have it.

10 The defense in the case is a classic
11 look-away defense. Distract the jury with pinpoint
12 pupils and hope they'll forget the evidence that is
13 right in front of them, based on the comment of a
14 first responder at the scene that night and four
15 patients with pinpoint pupils, conclude that death
16 came from some random patches of pesticides sprayed
17 at a property where chemicals, essentially, are not
18 used and ignore the superheated environment where
19 all three patients suffered intense heat and
20 intense humidity for two hours immediately
21 preceding their deaths.

22 The fact is that night no one -- not the
23 paramedics, the doctors, the cops,
24 Detective Diskin -- no one thought that anyone
25 would be so reckless as to deliberately expose

1 people to extreme heat and ignore those who fell
2 ill and unconscious in his tent.

3 Good time to take a break?

4 THE COURT: Yes, Ms. Polk. Thank you.

5 Ladies and gentlemen, we will take the
6 morning recess at this time. Remember the
7 admonition. Do not talk about the case to anyone
8 including among yourselves.

9 At this point we will be ordering lunch
10 at this break. And I had planned to go into the
11 lunch hour. If anybody has any special dietary
12 needs, that person will be respected. And we'll
13 just see where things are.

14 In any event, you will be having lunch
15 here even if you're not deliberating yet. You will
16 be having lunch here and ordering lunch.

17 Remember, please be reassembled at 11:00.

18 I'm going to ask the parties to remain
19 just a moment.

20 Thank you.

21 (Proceedings continued outside presence
22 of jury.)

23 THE COURT: The record will show the jury has
24 left the courtroom.

25 I just wanted to talk a bit about

1 scheduling. As I indicated to the jurors, we're
2 going to go ahead and have lunch ordered for them.

3 Ms. Polk, I would go over into noon, but
4 I don't know if you have an estimate of your time.

5 MS. POLK: Your Honor, I would hope to be
6 finished by noon.

7 THE COURT: All right. We'll just plan on
8 that.

9 MS. POLK: I may go a little over, but not
10 more than an hour over.

11 THE COURT: Okay.

12 (Recess taken.)

13 (Proceedings continued in the presence of
14 jury.)

15 THE COURT: The record will show the presence
16 of the defendant, Mr. Ray; the attorneys and the
17 jury.

18 Ms. Polk, you may continue.

19 MS. POLK: Thank you, Your Honor.

20 We spent days in this trial talking about
21 the wood and the rat poison, yet there is not a
22 single shred of evidence that the victims suffered
23 any symptoms that could have been caused by wood or
24 the wrong wood or the rat poison.

25 There has not been any suggestion or

1 medical testimony at all that any of the victims
2 died as a result of rat poisoning, which, as you
3 learned, would cause a person to bleed to death.

4 The defense team wants you to focus on
5 all the evidence we did not find and all the
6 strange places the evidence did not lead.

7 Detective Diskin followed the evidence.
8 And there is simply no evidence that pesticides,
9 that the wrong wood, or that rat poisons somehow
10 caused these deaths.

11 I want to talk just briefly about the
12 testimony of the Hamiltons. On page 5 of your jury
13 instructions you have an instruction that talks
14 about the First Amendment. And it says that the
15 First Amendment of the United States Constitution
16 guarantees every citizen freedom of speech and
17 religion. Thus you must not be prejudiced or
18 biased for or against Mr. Ray simply because you
19 may or may not disagree or dislike the content of
20 Mr. Ray's speech, religious and/or spiritual
21 beliefs and ideas.

22 The First Amendment applies to everyone
23 in this country, including the Hamiltons.

24 In determining the credibility of
25 witnesses, you are not to look at the rights, the

1 religious beliefs and the spiritual beliefs of
2 witnesses, including Mr. Ray. What you're supposed
3 to look at in determining credibility is found on
4 page 2 of your jury instructions under the
5 instruction called "Credibility of Witnesses."

6 This instruction gives you a number of
7 factors to look at in determining credibility and
8 tells you to consider all of the evidence in light
9 of reason, common sense and experience.

10 The factors listed in this jury
11 instruction about what you should be -- about how
12 you should be determining credibility of witnesses
13 are, in fact, the same things that Detective Diskin
14 told you about from the stand when he testified
15 about how does he determine credibility as he's
16 going about his investigation and talking to
17 witnesses.

18 The factors include a witness's ability
19 to see or hear the things the witness testified to;
20 the quality of the witness's memory; the witness's
21 manner while testifying; whether the witness has
22 any motive, bias or prejudice; whether they were
23 contradicted by prior statements; whether the
24 witness was granted an immunity agreement, and the
25 reasonableness of the witness's testimony in light

1 of the other evidence learned at the trial.

2 Just the Hamiltons' testimony, ladies and
3 gentlemen, not by ridiculing their beliefs, but by
4 looking at other objective factors. First of all,
5 no immunity was given to the Hamiltons.

6 Second, Detective Diskin told you they
7 were always cooperative whether their attorney was
8 present or not. And then, finally, look at all the
9 testimony of all the other witnesses who
10 corroborated what the Hamiltons had to say, and
11 specifically the policy at Angel Valley about the
12 use of chemicals and their belief that they wanted
13 to use as few chemicals as possible to respect all
14 of life out at Angel Valley.

15 Five different witnesses testified to
16 this policy: Michael Hamilton, Amayra Hamilton,
17 Debbie Mercer, Ted Mercer and Fawn Foster.

18 Now, the Mercers testified very
19 consistent with the Hamiltons that there is a
20 policy that they are not to use chemicals at all.
21 And you will remember that the Mercers testified
22 that they had had some sort of falling out with the
23 Hamiltons and that they had left Angel Valley long
24 before this trial began.

25 So in determining the credibility of

1 witnesses, keep in mind that the Mercers had no
2 motive to somehow be part of a conspiracy to
3 conceal chemicals at Angel Valley, because, in
4 fact, they told you they had left Angel Valley and
5 they had a falling out with the Hamiltons.

6 The Mercers are not being sued by anyone.
7 They testified to that. And they have been given
8 no immunity agreements.

9 Remember Debbie Mercer when one of the
10 defense attorneys asked Debby if Rotillo perhaps
11 had bought the chemicals with his own money,
12 brought them to Angel Valley and sprayed them
13 there? Remember her reaction, how she laughed out
14 loud at the suggestion that Rotillo would go
15 purchase chemicals with his own money and spray
16 them at Angel Valley without anybody knowing:

17 Every single witness, all five of those
18 witnesses, were consistently firm about the minimal
19 use of chemicals at Angel Valley and absolutely no
20 weed killer, absolutely no pesticide was ever
21 sprayed at that site where that sweat lodge tent
22 was constructed.

23 You learned that there, in fact, is a
24 landscape cloth under that area to keep the weeds
25 down. And you learned that sand has been brought

1 in every few years to cover the area. There is
2 simply is no evidence, ladies and gentlemen, of
3 organophosphates, that somehow rat poisons caused
4 these deaths or that some other mysterious toxin
5 from the wood or some other source is to blame for
6 the deaths in this case.

7 What are we left with? We are left with
8 what is right in front of everybody's eyes, that
9 sweat lodge with intense and searing heat and
10 steam, the environment where the three patients
11 were found, where they spent two hours before they
12 collapsed and they died.

13 Now, in helping you decide whether it was
14 Mr. Ray's conduct, his extreme-heat event that
15 caused the death of the victims, you can look at
16 what happened in prior years at Angel Valley when
17 Mr. Ray was conducting his prior events.

18 Jennifer Haley, the Dream Team hair
19 dresser from 2009, testified that she was a
20 participant at Mr. Ray's event in 2007. And
21 Jennifer told you that Mr. Ray was her mentor and
22 her teacher and that she believed he knew something
23 she didn't, and she was committed to finding out.

24 Jennifer told you that she believed,
25 because of Mr. Ray's teachings and because she had

1 paid that \$10,000, that she needed to endure the
2 heat in that sweat lodge in 2007 for her dreams to
3 come true.

4 And in 2007 Jennifer stayed in the tent,
5 she told you, for four rounds and felt like she was
6 going to die. And that when she got out, remember
7 how she told you she felt like all of her dreams
8 were not going to come true?

9 Now, this is a photograph from 2008. As
10 the defense told you, it's the lady named Hermia.
11 Now, 2007 she was a participant. In 2008 in this
12 photograph she's now a Dream Team member.
13 Witnesses have testified that in 2007 she was the
14 participant who was carried out unconscious,
15 unresponsive, and taken up to the rooms where she
16 was immediately cooled.

17 But, again, this is where looking at what
18 happened at Mr. Ray's prior sweat lodges is so
19 relevant to this issue of causation. The defense
20 wants you to believe organophosphates caused the
21 death and forget the following: That people get
22 sick in that hot tent at Angel Valley only when it
23 is Mr. Ray facilitating or conducting his sweat
24 lodge ceremony. It doesn't matter if it's the same
25 structure as it was in 2008, or a different

1 structure, as it was in 2007. It's the extreme
2 nature of the defendant's ceremony that causes
3 people to get sick and that caused the people to
4 die in 2009.

5 The testimony was that when others
6 facilitate a sweat lodge ceremony at Angel Valley,
7 no one gets sick, and that in between the heat
8 events of Mr. Ray of 2008 and 2009, others had
9 conducted sweat lodge ceremonies at Angel Valley
10 lying in that same dirt, in that same structure,
11 with the same coverings, and no one got sick. And
12 that in between Mr. Ray's heat events of 2007
13 and 2008, other ceremonies were conducted at the
14 site, again, lying in that same dirt, this time in
15 a different structure with similar coverings.

16 When other people do it, no one gets
17 sick. When Mr. Ray does it, people get sick. You
18 can consider that information in deciding whether
19 it's some mysterious toxin or it's Mr. Ray's
20 conduct, his extreme event, that caused the victims
21 to die.

22 Debbie Mercer testified she was there in
23 2007 for Mr. Ray's Spiritual Warrior event and his
24 sweat lodge. She told you that she was alarmed,
25 that she had never seen people put in this kind of

1 condition before. Debby told you she saw vomiting.
2 She saw eyes rolled in the back of heads and that
3 she saw people unconscious.

4 Debby told you in 2007 she assisted 20
5 participants, that a woman came out, had trouble,
6 fell on her face. And you remember Debby
7 remembering the lady's pretty blue eyes fluttering
8 and how her face was scraped up after she fell.
9 Debby testified how she and a Dream Team member in
10 2007 were with one unresponsive lady for 20
11 minutes.

12 And Debby testified about 2008. And,
13 again, Debby told you that she saw vomiting, eyes
14 rolled back in the head, unconscious people. Debby
15 told you that she assisted 12 people in 2008 who
16 needed help just to get out. Debby told you how a
17 man came out yelling that he had to save his
18 girlfriend. And Debby told you about Hermia
19 convulsing off and on. And, finally, Debby told
20 you about a third woman in 2008 who was incoherent.

21 Now, Linda Andresano, the nurse from
22 Tucson, Debby and Ted Mercer and Fawn Foster, all
23 testified about other sweat lodge ceremonies that
24 they had done and how extreme Mr. Ray's conduct was
25 in comparison to the careful behavior of other

1 facilitators. They testified how others do four
2 rounds, use far fewer rocks, gently ladle the water
3 on the hot rocks --

4 MR. LI: Your Honor, may I approach?

5 THE COURT: Yes.

6 (Sidebar conference.)

7 MR. LI: Your Honor, this is purporting to
8 establish some sort of standard of conduct that has
9 never been adduced at trial and that this Court has
10 explicitly ruled does not exist. This argument is
11 improper.

12 MS. POLK: Your Honor, this argument goes
13 directly to the issue of causation, the comparison
14 of what happens with other sweat lodge ceremonies
15 in that same structure.

16 THE COURT: I didn't have any issue with it
17 until now. It's inviting -- again saying --
18 there's no dispute Mr. Ray talks about how his is
19 absolutely, completely different. The comparison
20 of causation can be made. But suggesting there was
21 some kind of standard out there with sweat lodges I
22 didn't make a specific ruling on.

23 MS. POLK: Your Honor, I'm specifically
24 talking about causation. I'm not talking about any
25 sort of reasonable standard. But what I'm showing

1 the jury is that it's Mr. Ray's extreme conduct
2 that caused the deaths, that that's the causation
3 issue. This is all testimony that came in at
4 trial.

5 THE COURT: It -- once again, it's the
6 purpose. And there were some comparisons made.
7 There were similar materials. All those things can
8 come in if they're accurately portrayed. But any
9 suggestion that there is somehow some right
10 standard out there they should only do four rounds
11 or something like that.

12 And then saying in terms of conduct,
13 causing conduct, has a specific definition of the
14 instructions that talk about criminal behavior.
15 That's the problem with using conduct right now.
16 The instructions define it as criminal behavior,
17 the act of or omission. And we've gone through
18 that.

19 There can be discussions in terms of
20 causation, Ms. Polk, and I have no issue. Now it's
21 getting on the suggestion somehow there is some
22 other standard out there of how to properly conduct
23 a sweat lodge. That's all I can say. It's a
24 dangerous area for the whole case.

25 Go ahead.

1 MS. POLK: Your Honor, you know what. Let me
2 make the record that this is the issue of
3 causation. It's the defendant's extreme conduct
4 that causes people to get sick. And that is the
5 point I'm making is that his sweat lodge facilities
6 are extreme. And I'm basing it on testimony that
7 came in at trial. I'm not talking about any sort
8 of reasonable-person standard. I'm talking about
9 how he does it and that his is extreme compared to
10 how other people did it.

11 THE COURT: You've made that point already
12 that other people don't get sick, this comparison.
13 So it's this close point we've gone through all the
14 way through, Ms. Polk. And that's all I can say.
15 There just cannot be comparison to a standard that
16 does not exist. It was admitted for purposes of
17 causation. If it stays strictly to that, does
18 not -- stays within the confines of the evidence
19 too that, in fact, there was not an identity
20 between materials, if it's accurately represented,
21 it's permissible.

22 Thank you.

23 (End of sidebar conference.)

24 THE COURT: Ms. Polk, when you're ready.

25 MS. POLK: Thank you, Your Honor.

1 Many witnesses have testified in this
2 court about the extreme nature of Mr. Ray's sweat
3 lodge ceremony. It is the ultimate heat challenge.
4 This abomination of a sweat lodge ceremony, extreme
5 nature of Mr. Ray's conduct, the extreme heat and
6 the extreme humidity that caused people to get sick
7 and finally caused the deaths of three people, and
8 not some random patches of the pesticides.

9 There has been several, I'll call them,
10 "attacks" on the state. And I'm going to address
11 just a few of them.

12 First, I never thought I would find
13 myself having to defend the fact that I'm a working
14 county attorney. So I'm just going to leave that
15 one alone.

16 Second, I want to talk about this meeting
17 in December of 2009 at the county attorney's office
18 with the medical examiners. Mr. Li made several
19 references to this so called secret meeting. What
20 you learned at trial is that there was a charging
21 meeting at the county attorney's office and that
22 such meetings are not unusual as the prosecutors
23 and the detectives review cases. Our belief that
24 the defense attorneys were not entitled to the
25 details --

1 MR. LI: Objection, Your Honor.

2 MS. POLK: -- of our charging meeting was
3 addressed by this point.

4 THE COURT: Counsel, approach, please.
5 (Sidebar conference.)

6 MR. LI: May I state my objection?

7 THE COURT: You know, this is an unusual
8 situation, Ms. Polk and Mr. Li.

9 But, Mr. Li, go ahead and articulate.

10 MR. LI: The objection is that the county
11 attorney is, essentially, testifying as to what she
12 believes her purposes were, No. 1, which is not
13 permissible. She is talking about actual facts in
14 the case. She says, our belief was, et cetera.
15 That's not permissible.

16 Secondly, this was the subject of a
17 ruling in which the Court did grant -- in fact,
18 granted sanctions. So whatever position the state
19 actually had, this court found was incorrect and
20 granted sanctions and also permitted the additional
21 questioning of these various witnesses. The fact
22 of the matter is this court explicitly found that
23 this was not protected by the work product. So
24 whatever arguments the state wants to make, they
25 cannot make.

1 MS. POLK: Your Honor, these constant
2 interruptions are totally inappropriate.
3 Detective Diskin testified. And what I'm going to
4 say right now is that our belief his attorneys were
5 not entitled to learn about this meeting was
6 addressed in this court. And that came out in the
7 testimony of Detective Diskin. And that this court
8 ruled and that we moved on and that the defense
9 attorneys got to interview the witnesses. That's
10 all in front of the jury.

11 MR. LI: Then we should get a jury instruction
12 that the Court ordered that our attorneys' fees be
13 paid --

14 MS. POLK: Judge, this all came out --

15 MR. LI: -- the discussions that the county --
16 the positions that the county attorney took that
17 were improper.

18 THE COURT: Summaries of what Detective Diskin
19 testified to, that's permissible. The problem is
20 talking about a belief that's not per the evidence.
21 You haven't testified, Ms. Polk.

22 MS. POLK: I'll say the position that the
23 defense attorneys were not entitled to find out
24 about the meeting was addressed by this court.
25 That's what I'm trying to say. And that came out

1 through Detective Diskin. This court addressed it,
2 that you ordered that they got to talk to the
3 witnesses, and that's what happened.

4 THE COURT: I believe that was the testimony,
5 essentially.

6 MR. LI: It's misleading to leave it at that.
7 This court also granted sanctions because the
8 county attorney took a bad-faith position. That's
9 the facts. So if you want to talk about it, they
10 they're going to have to talk about it all. If
11 they just want to pretend as if it didn't happen
12 like that, they can't.

13 THE COURT: It's going to come through that
14 Detective Diskin said the Court ordered that there
15 be the follow-up interviews.

16 MR. KELLY: Just to clarify Detective Diskin's
17 testimony, I did the cross-examination. When I
18 went down this path, Ms. Polk objected, and it was
19 sustained. I was not allowed to tell this jury
20 that the government was sanctioned.

21 THE COURT: I think it came out. It actually
22 did come out. But it was not -- we're not going to
23 get into the sanctions. It can be admitted. The
24 chronology of what happened that came in through
25 Detective Diskin can be admitted. But this whole

1 idea of the Court getting involved -- I know the
2 defense wanted an instruction regarding Brady, and
3 I stayed away from that. That's a question for a
4 different type of remedy that I do not find
5 appropriate. And that's setting -- it just needs
6 to stay with the facts, just as with the comparison
7 before. As long as the facts are there and stated,
8 it's okay. But implying these things, standards or
9 something like that, that's the problem.

10 MS. POLK: What I'm going to say is that our
11 position was addressed by the Court. The Court
12 issued a ruling, and the witness were interviewed.
13 And that all came out through Detective Diskin's
14 testimony. That's clearing the suggestion that
15 there has been some secret meeting that the jury
16 doesn't get to hear about.

17 THE COURT: That's the testimony, then that's
18 what's permissible.

19 MR. KELLY: Your Honor, in addition to
20 improperly stating the facts, it's also improper
21 for the prosecutor to misstate the law. And the
22 law in this case was that the government was
23 sanctioned, including attorneys' fees.

24 So any attempt to explain that away
25 because you had sustained my earlier objection

1 misleads this jury because it's not the truth.

2 MS. POLK: I'm going to ask that counsel -- I
3 didn't interrupt Mr. Li. Many, many things were
4 said that I thought were misleading. It's very
5 unprofessional, the constantly interrupting me.

6 THE COURT: It's starting out -- it's ending
7 up with a closing as it did with opening, a
8 situation that I've never been exposed to
9 whatsoever.

10 MR. LI: Just never had a prosecutor talk
11 about what her belief was. I have to object.

12 THE COURT: I understand.

13 MS. POLK: I'm going to say the position.
14 I'll correct that.

15 MR. KELLY: Your Honor, with all due respect,
16 our big concern is waiver. We believe there has
17 been some -- I've been keeping track. Some
18 significant problems that put us in an
19 uncomfortable position as to whether to object
20 during Ms. Polk's closing or request a sidebar.

21 So to the extent that we can preserve all
22 our objections for subsequent discussion, we'd make
23 that motion. But you had repeatedly cautioned us
24 throughout the course of the trial that you would
25 not do that.

1 THE COURT: They're going to be preserved,
2 Ms. Polk. And all I can say is if we can get to a
3 point where it gets beyond argument improper, to
4 improper arguments, going beyond the facts, and if
5 that's -- I'm trying to have the trial proceed in a
6 fair manner. And I've made these rulings. It just
7 needs to stick to the evidence.

8 And I recall the defense saying, at least
9 in this context, Ms. Polk, it had to do with not
10 answering questions or something was actually the
11 factual -- what was facts. And what
12 Detective Diskin said or came in wasn't objected
13 to. If it was objected to, if I overruled it, that
14 evidence with regard to what Detective Diskin
15 testified to, that's permissible. That's it.

16 Thank you.

17 (End of sidebar conference.)

18 THE COURT: Ms. Polk.

19 MS. POLK: Back to the secret meeting. As you
20 heard through the testimony of Detective Diskin,
21 the issue of whether or not the defense attorneys
22 were entitled to the details of that charging
23 meeting was addressed by the Court. The Court
24 issued a ruling, and the witnesses were then made
25 available for the defense attorneys to interview.

1 What you learned at trial, in fact, is
2 the witnesses were interviewed by the defense. And
3 so any suggestion that somehow there is information
4 in this case that the defense was not able to get
5 from the state would be false.

6 Mr. Li complains because our meeting was
7 apparently not big enough. Where were the ER
8 doctors, the physicians from the hospital? Where
9 was Dawn Sy? Why did I not pick up the phone and
10 invite them all to this meeting?

11 Real life is not like CSI on TV with cops
12 and prosecutors having free access to the crime
13 labs. That's what reports are for. Reports are
14 how the professionals communicate.

15 Mr. Li said many times that
16 Detective Diskin never communicated with Dawn Sy.
17 And as you heard from Detective Diskin, that was
18 true, but Detective Diskin communicated, as he told
19 you, with Dawn Sy's supervisor. You also learned
20 from Dawn Sy that her supervisor communicated with
21 the medical examiner.

22 Mr. Li made hay of the fact that the
23 state did not call Dawn Sy as a witness, and yet
24 you learned that we had her here ready to testify
25 but ran out of time. Meanwhile her work, that lab

1 report and all those lab notes were admitted.
 2 Again, that's what the lab reports and notes do.
 3 They are the communication between the
 4 professionals.
 5 The defense did call her. But was there
 6 anything in her testimony that the state wanted to
 7 hide? No. In fact, she testified that when asked
 8 on examination by the defense, when asked about
 9 whether the state should have preserved the entire
 10 sweat lodge intact for testing, she stated, no.
 11 Her testimony was that she saw no evidentiary value
 12 in preserving that entire sweat lodge.

13 And she further testified that the soil
 14 samples that were collected in this case were
 15 adequately representative of what was in that sweat
 16 lodge.

17 So I'm going to address head on with you
 18 the suggestion that the state somehow destroyed
 19 evidence that had evidentiary value. Mr. Li is
 20 exactly right. The defendant and the defense has
 21 no obligation whatsoever to produce evidence or to
 22 test any evidence.

23 What you have heard from Dawn Sy, the DPS
 24 criminalist, and Detective Diskin and from the
 25 medical examiners and you have seen with your own

1 eyes is that all the samples in evidence that was
 2 seized in this case have been preserved and is
 3 available and has always been available for testing
 4 by either party.

5 Cedar logs used to heat the rocks, the
 6 rocks themselves, the upright poles in the sweat
 7 lodge, samples of the coverings, samples of the
 8 soil, samples of the water, the electrolytes and
 9 lemon water at the scene and samples from the three
 10 victims all was preserved.

11 Again, Mr. Ray has no obligation to
 12 produce any evidence, but it would be completely
 13 false for anyone to suggest to you that items of
 14 evidentiary value were destroyed.

15 Mr. Li talked to you about the
 16 conversation that Detective Barbaro,
 17 Sergeant Barbaro, had with the defendant at the
 18 scene and suggested to you that perhaps
 19 Sergeant Barbaro was confused.

20 As you will recall, Sergeant Barbaro
 21 testified about two conversations, the first one
 22 that he had alone with Mr. Ray. And then there was
 23 a second conversation where Lieutenant Parkinson
 24 had then joined them. Sergeant Barbaro in no
 25 uncertain terms told you he was clear that when he

1 asked Mr. Ray who was running the sweat lodge,
 2 Mr. Ray replied what? Ted, the fire tender, did
 3 it.

4 I want to review with you the testimony
 5 of Dr. Beverly Bunn. You will recall she's the
 6 dentist from Houston. This was her second paid
 7 event with Mr. Ray. She was not a cult member.
 8 Nor did you ever hear the state talk about cults or
 9 say this was a cult or call anybody a cult member.

10 Mr. Li did in his opening. The defense
 11 attorneys in cross-examining witnesses, and Mr. Li
 12 did again in his closing. But you never heard the
 13 state talk about cults.

14 This is not a case about cults. This is
 15 a case about a man, James Ray, who marketed himself
 16 as a qualified professional, who charged \$10,000
 17 for a five-day event, not including room and board,
 18 and then recklessly caused the deaths of the
 19 participants who trusted he knew what he was doing
 20 and who reasonably relied on him to keep them safe.

21 You learned from Dr. Bunn that after she
 22 shared a comment on Sunday at the open mic that
 23 Mr. Ray told her to work only with him all week
 24 and that she did.

25 Dr. Bunn told you how the Samurai Game

1 lasted seven hours and that when they were done,
 2 Mr. Ray told them he was appalled, that he had
 3 never seen the game played so poorly and they were
 4 all so worried about dying that they forgot to
 5 live.

6 On Thursday morning about three hours
 7 before the participants entered that superheated
 8 tent, they were all told by Mr. Ray to write their
 9 obituaries. Dr. Bunn told you that she struggled
 10 all week over whether to shave her head and finally
 11 did so one hour before that sweat lodge began.

12 In her words, shaving her head was part
 13 of playing full on. And she did not want to be
 14 perceived as a person who was not participating.

15 Dr. Bunn testified that Mr. Ray had told
 16 her and everyone to get the most out of everything
 17 he had in mind for them for the week, they needed
 18 to play full on. And so after struggling with it
 19 all week long, finally one hour before entering the
 20 sweat lodge, Dr. Bunn had her head shaved.

21 Inside the sweat lodge for the first
 22 round, according to Dr. Bunn, 12 superheated rocks
 23 came in, rocks that were, according to Ted Mercer,
 24 the hottest rocks he had ever made.

25 And you will recall Mr. Mercer's

1 testimony that he was called to the circle around
2 the intentions fire and that Mr. Ray told everybody
3 these are the hottest rocks ever.

4 According to Dr. Bunn, that first round
5 lasted 20 to 25 minutes. And Dr. Bunn described
6 for you the rocks as being glowing hot red when
7 they came into the tent. Dr. Bunn told you how
8 Mr. Ray dumped the buckets of water on the rocks at
9 the beginning of each new round, approaching the
10 back area of the sweat lodge each time,
11 experiencing each time arguably how much hotter it
12 was near the pit and near the back of the tent.
13 Nonetheless, as you have heard from all the
14 witnesses, Mr. Ray continued round by round to
15 build the heat in that tent.

16 Dr. Bunn told you, having been told by
17 Mr. Ray not to speak, how no one spoke in the first
18 few rounds. And she described for you the heat,
19 how she could feel the heat from the steam like it
20 was fire, how it was too intense, too hot, and how
21 she could not even sit up, how she laid down on her
22 back, but how the heat was so intense she had to
23 lift her legs in the air to get them away from the
24 pit, how sweltering, humid and suffocating it was
25 and how there was no relief.

1 She testified how hard it was to swallow
2 or breath, how crowded it was, how much she was
3 sweating, how she stopped the chanting and just
4 tried to breath, and how she laid with her head two
5 feet from the exterior wall and still felt no air
6 at all.

7 She testified how there was a dramatic
8 difference between the air at the top of the tent,
9 and at the bottom of the tent and how much hotter
10 at the top of the tent it was where you could not
11 breathe at all. And that's why she had to lie
12 down.

13 Dr. Bunn testified how by round 3 she was
14 struggling and how she tried to sit up but was too
15 dizzy. She testified how Mr. Ray kept yelling out
16 in that powerful voice, you're more than that. You
17 can endure this. You can do this.

18 And by the end of round 3, Dr. Bunn told
19 you she had decided she had had enough and she was
20 going to stay just one more round and then get out.
21 And she testified how at the end of round 4 she sat
22 up to crawl out. She felt so dizzy she wasn't sure
23 she could make it out. And as she crawled toward
24 the door to get out in the short time that door was
25 open, Mr. Ray said to her, Beverly, especially you

1 are stronger than this. You know you can do this.
2 You can endure this.

3 You will remember how Dr. Bunn testified,
4 as several witnesses did, that she thought, well,
5 obviously Mr. Ray knows better than I do. He's
6 done this before. She told you how because she had
7 been working with Mr. Ray all week, she did not
8 want to let him down. She said that she was at the
9 event to work on personal issues on her life, that
10 she needed to work on them, and they thought that
11 Mr. Ray knew more than she did what she needed to
12 do.

13 And so Dr. Bunn, instead of getting out
14 of there after that fourth round, kept crawling and
15 found a spot at the 9:00 o'clock position.
16 According to Dr. Bunn, in this position she was
17 able to get some air every time the door opened.
18 From this new position Dr. Bunn managed to stay in
19 the tent for the entire event.

20 You heard testimony from many witnesses,
21 such as Brandy Rainey, about the growing chaos and
22 distress outside the sweat lodge, about Lou and
23 Dennis both projectile vomiting, about Amy Grimes
24 being brought out unconscious. And meanwhile
25 inside the sweat lodge, Dr. Bunn described for you

1 how the conditions grew worse; how people
2 deteriorated and collapsed; how Mr. Ray, the
3 defendant, knew about it yet ordered that people be
4 left where they were until his event was over.

5 Dr. Bunn told you how the defendant
6 repeatedly exhorted the participants that this was
7 mind over matter, you are stronger than this, and
8 you are more than your body. You're stronger than
9 this. You're stronger than your body, she
10 testified.

11 According to Dr. Bunn, not once, not
12 ever, did Mr. Ray encourage anyone to leave who was
13 not feeling well. To the contrary, and consistent
14 with what he had told the participants prior to the
15 event, it was an event to push through in order to
16 have a breakthrough.

17 Dr. Bunn described for you how a man
18 named Carlos got to the second round and tried to
19 get out. She said, he was staggering and crawling
20 and that they had to grab him so he didn't fall in
21 the pit. This happened right in front of Mr. Ray.
22 And Dr. Bunn told you how much it scared her.

23 She talked about Lou falling into the pit
24 and burning his arm. She talked about how
25 participants were dragged out unconscious right in

1 front of Mr. Ray, who did nothing except continue
2 his event.

3 Dr. Bunn told you that someone crawled
4 out the back of the tent and that Mr. Ray was angry
5 and yelled out that was sacrilegious, that you
6 could only leave out through the door.

7 You heard testimony from Brandy Rainey,
8 who came out after the fifth round, that she saw
9 Mr. Ray come out first when he finally ended his
10 event, sweating and looking fine, and how he turned
11 to his assistant, Taylor Butler, and asked what do
12 you think about the sweat lodge, and how Taylor
13 answered, nobody does a sweat lodge like you,
14 James.

15 And then Brandy testified how Mr. Ray got
16 hosed off, got some water and sat in a chair in the
17 shade, leaving the Dream Team members, the Mercers
18 and other participants to deal with the sick and
19 the dying. Dr. Bunn told you that when it was
20 over, she helped push out an unconscious woman.
21 And that while Dawn Gordon says she did not here
22 any sounds from Kirby Brown as Dawn crawled out,
23 Dr. Bunn testified that when she passed Kirby,
24 Kirby was still making that snorting, gurgling
25 sound.

1 According to Melinda Martin, the employee
2 who performed the rescue breathing on Kirby Brown,
3 she was still making those sounds when she was
4 doing the rescue breathing.

5 According to Debbie Mercer, about 15
6 minutes passed before everyone had cleared out.
7 And Debby looked inside and saw the three people
8 still there. And during those 15 minutes, where
9 was Mr. Ray? He was outside sitting in the shade,
10 drinking his water.

11 You heard testimony, medical testimony,
12 about how time is of the essence to remove a
13 heat-stroke patient from the heat source and how
14 medical personnel have a chance of restoring a
15 heart to a person whose heart still has a shockable
16 rhythm.

17 But when you consider whether Mr. Ray's
18 conduct was a gross deviation from the conduct of a
19 reasonable person in that situation, ask yourselves
20 whether a reasonable person who has been told that
21 people are unconscious and in trouble and not
22 breathing leaves them there not only for two more
23 rounds, but when the event is over for another 15
24 minutes while he himself cools off and hydrates.

25 We will never know whether those

1 additional 15 minutes that Kirby and James laid
2 still inside that sweat lodge while Mr. Ray cooled
3 himself in the shade would have made a difference
4 to life or death.

5 But you do know, ladies and gentlemen,
6 that Mr. Ray's conduct was not the conduct of a
7 reasonable person in that situation. And when you
8 consider the question of whether Mr. Ray was aware
9 of and consciously disregarded the risk of death
10 created by his conduct, ask yourselves why he was
11 not alarmed at what everyone else describes as
12 chaos, carnage and a mass suicide.

13 The reason Mr. Ray was not alarmed even
14 after the event, even while sitting in the shade
15 surveying the situation, even while learning that
16 three people were still down inside the sweat lodge
17 inside the tent is because that everything that was
18 happening was what he intended to happen.
19 Everything was happening -- everything that was
20 happening is what he expected to happen except for
21 death.

22 Mr. Ray intentionally used heat to cause
23 these extreme altered mental status changes in his
24 participants. And that's why after the event he
25 comes out, he sits down in the chair. You heard

1 how other witnesses reacted, are taking care of
2 people, and Mr. Ray is just sitting there. That's
3 because everything that happened was what he
4 intended to happen except for death.

5 Sitting in his chair in the shade, what
6 would Mr. Ray have seen? According to Dr. Bunn,
7 Sidney Spencer was lying there barely breathing,
8 making that slight checking sound with her breath.
9 Kristine was flailing, screaming, James Ray. James
10 Ray.

11 Another woman lay there unconscious with
12 an arm that had turned blue, according to Dr. Bunn,
13 from lack of circulation. Stephen Ray was also
14 unconscious, his eyes rolled back in his head and,
15 according to Dr. Bunn, the blood vessels burst with
16 pupils dilated.

17 And Brandy Rainey, who came out after the
18 fifth round, described for you how Tess Wong was
19 brought out when it was over and was laying on the
20 tarp making horrible sounds, having what looked
21 like a seizure to Ms. Rainey. Ms. Rainey told you
22 that the defendant sitting less than three feet
23 away simply asked who was making that noise.

24 Mr. Li incorrectly told you in his
25 closing arguments that the state has to prove that

1 Mr. Ray knew that people were dying. We do not.
 2 It's in your jury instructions. We do not have to
 3 prove that Mr. Ray knew people were dying. What we
 4 have to prove is that Mr. Ray was aware of and
 5 consciously disregarded a substantial and
 6 unjustifiable risk that his conduct would cause
 7 death. Awareness that your conduct will cause
 8 death is different from knowing that people are
 9 actually dying.

10 For reckless manslaughter you must find
 11 beyond a reasonable doubt that Mr. Ray was aware of
 12 and consciously disregarded the risk that his
 13 conduct would cause death, not that he knew that
 14 people were dying.

15 Mr. Ray told you that manslaughter is for
 16 cases where people are shooting off guns or
 17 slashing with knives. It is not the weapon that
 18 determines the degree of homicide that a person may
 19 or may not have committed. It is the culpable
 20 mental state of the person using the weapon that
 21 determines the crime. When a person as a result of
 22 another person's criminal conduct dies, there are
 23 different levels of homicide that could possibly
 24 have occurred.

25 In reckless manslaughter, reckless

1 manslaughter is a charge that is meant to prevent
 2 people from recklessly engaging in conduct they
 3 know can cause death, exactly what happened here.
 4 And when a person doesn't know or fails to perceive
 5 the risk that their conduct will cause death, then
 6 their failure to perceive it -- and their failure
 7 to perceive it is a gross deviation from the
 8 standard of conduct of a reasonable person, then
 9 you have the lesser offense of negligent homicide.

10 But in both instances what we have to
 11 prove is that Mr. Ray's conduct created the risk of
 12 death, not that Mr. Ray knew that people were
 13 dying.

14 Mr. Li argued to you that Mr. Ray could
 15 not have known that people were dying because he
 16 claims no one knew. In fact, as you have seen in
 17 this case by listening to all of the witnesses,
 18 many people did know that something was wrong and
 19 that people were in trouble.

20 Many people did call out to Mr. Ray, the
 21 master of the lodge, as he called himself, for help
 22 and guidance. And when they called out to him for
 23 help and guidance, he told them to leave
 24 unconscious people where they were until the round
 25 was over, and he told them that participants with

1 labored breathing, such as Liz Neuman and Kirby,
 2 were fine.

3 That's what the crime of manslaughter is
 4 about, being aware that your conduct creates a
 5 substantial and unjustifiable risk of death, which
 6 Mr. Ray clearly was, and consciously disregarding
 7 that risk, which Mr. Ray clearly did.

8 You have learned through all the
 9 testimony that after the fifth round Dennis
 10 Mehravar passed out. And when he awoke, he
 11 believed he was having a heart attack and screamed
 12 out, I'm dying. I'm dying. And you learned that
 13 Mr. Ray did not take heed but simply leaned out of
 14 the tent and yelled out Dennis, buddy, you're not
 15 going to die. Less than an hour later two people
 16 were dead.

17 The state does not have to prove that
 18 Mr. Ray or anybody knew that people were dying. We
 19 do have to prove that Mr. Ray was aware of and
 20 consciously disregarded the substantial and
 21 unjustifiable risk that his conduct would cause
 22 death.

23 Without question beyond any reasonable
 24 doubt, the state has proven that Mr. Ray was aware
 25 that people were unconscious, not breathing and in

1 trouble and that he consciously disregarded the
 2 substantial and unjustifiable risk that his conduct
 3 would cause death.

4 The defense has suggested to you that
 5 what occurred on October 8 during Mr. Ray's
 6 Spiritual Warrior event was merely an accident.
 7 Intentionally using heat to create an altered state
 8 and being reckless about the consequences is not an
 9 accident.

10 In order to find the defendant guilty of
 11 manslaughter, you must find that his disregard of
 12 the risk of death created by his conduct was a
 13 gross deviation from the standard of conduct of a
 14 reasonable person in that situation.

15 I'm going to read to you from page 6 of
 16 your instructions. The risk must be such that
 17 disregarding it was a gross deviation from the
 18 standard of conduct that a reasonable person would
 19 observe in the situation.

20 The jury instructions tell you that
 21 conduct in civil cases is inadvertence or
 22 heedlessness and that criminal conduct is conduct
 23 which is extreme or flagrant, outrageous or heinous
 24 or grievous.

25 Heat stroke or hyperthermia is a horrific

1 way to die. What makes this case so unbearably sad
2 is that it was entirely preventable. Death in that
3 loaded sweat lodge was entirely preventable. Would
4 three people have died if Mr. Ray had acted like a
5 reasonable person in that situation?

6 And the standard is not a reasonable
7 person, a participant inside that sweat lodge whose
8 mental status has been altered by the heat. But
9 the standard is that of a reasonable person in
10 Mr. Ray's situation. And so ask yourselves how a
11 reasonable person who has charged \$10,000 per
12 participant for his event, who is facilitating that
13 sweat lodge ceremony, how would a reasonable person
14 act?

15 If Mr. Ray had done what a reasonable
16 person would have done, we would not be here. If
17 Mr. Ray had stopped his event when Amy Grimes
18 passed out after the fourth round and was dragged
19 out unconscious right past him, like a reasonable
20 person would have done, would we be here?

21 And what if Mr. Ray had stopped when
22 Megan Fredrickson, his own employee, who sat right
23 beside him in the sweat lodge, in the tent, had
24 warned him, James, these people are your
25 responsibility?

1 What if Mr. Ray had stopped the event
2 when Lou passed out and fell into the pit, as a
3 reasonable person would have done? Would we be
4 here?

5 If Mr. Ray had stopped the event when
6 Dennis crawled out, passed out, and came to
7 screaming that he was dying, as a reasonable person
8 would have done, would we be here?

9 You recall the testimony from Melinda
10 Martin that when Dennis came out screaming, I don't
11 want to die and vomiting everywhere, how horrified
12 she felt and how a Dream Team member told her to
13 get that look of horror off her face.

14 And Melissa Martin, who testified about
15 seeing Mr. Ray talk to Dennis when the event was
16 over -- and Melissa Martin told you she saw Mr. Ray
17 give Dennis a high five for his near-death
18 experience.

19 I'll remind you again of Dennis's
20 testimony about what Mr. Ray said to him about
21 Dennis's experience. Mr. Ray said to Dennis when
22 this was all over, amid all the chaos that
23 witnesses have described to you was going around,
24 he said to Dennis, you died and you were reborn.
25 Now go take a shower.

1 Again, the state does not quibble with
2 the notion that Mr. Ray never intended for people
3 to die. That is not what the reckless manslaughter
4 statute is about. We don't quibble with the notion
5 that Mr. Ray used death as a metaphor. But when
6 you deliberately confuse a metaphor with reality,
7 it is no longer a metaphor.

8 Where is the metaphor in telling
9 participants to push through the pain of your body
10 collapsing from heat illness? Where is the
11 metaphor in intentionally using heat to create an
12 altered state and telling participants to ignore
13 your body's warning signs? That is not a metaphor.
14 That is criminal recklessness.

15 What if Mr. Ray had stopped the event
16 before the sixth round instead of yelling at
17 Michael Olesen to leave Kristina alone where she
18 was babbling and clinging to her pouch? What if
19 Mr. Ray had stopped this heat-endurance challenge
20 when Scott Barratt around the sixth round tried to
21 help Linda Andresano, who was collapsed at the back
22 of the tent against the wall? What if Mr. Ray,
23 instead of telling Scott, just leave her, we need
24 to keep on going -- what if he had stopped this
25 event? Would we be here?

1 And what if Mr. Ray had stopped his
2 heat-endurance challenge at the sixth round when
3 James Shore dragged Sidney Spencer, lifeless, limp
4 and unconscious, right past Mr. Ray out of the
5 sweat lodge and bumped his head on the frame as he
6 went back in?

7 What if Mr. Ray had stopped his ceremony,
8 his heat-endurance challenge, then when James Shore
9 brought Sidney Spencer out? Would we be here?

10 What if around the fifth or sixth round
11 Mr. Ray had taken the time to learn what it was
12 about Liz Neuman's condition when Laura Tucker,
13 concerned enough that she disregarded Mr. Ray's
14 orders not to talk in the sweat lodge, called out,
15 James, it's Laura? I'm concerned about Liz?

16 What if instead of announcing for
17 everyone in that tent to hear, including Liz,
18 without checking on Liz, that Liz has done this
19 before and she knows what she's doing -- what if
20 Mr. Ray had simply stopped the ceremony and checked
21 up on Liz?

22 If Mr. Ray had done what a reasonable
23 person in that situation would do, check up on his
24 participants when he learns that people are in
25 distress, would three people be dead?

1 And if when Melissa Phillips, who was
2 seated at the 2:00 o'clock position, called out
3 five to six times that Kirby wasn't breathing and
4 needed to be taken out, if Mr. Ray had simply done
5 what any reasonable person would do, stop the event
6 and tended to that person who wasn't breathing,
7 would we be here?

8 You heard testimony about the horrible,
9 loud, snorting and gurgling sounds that Kirby was
10 making. And you heard testimony from seven
11 witnesses inside the tent who told you they heard
12 calls of concern for Kirby, that she wasn't doing
13 well, that she was in trouble. She was unconscious
14 or she needed to get out. You heard testimony that
15 Mr. Ray responded to wait until after the round was
16 over.

17 Laurie Gennari and Dr. Bunn, lying in
18 their spots near the 9:00 o'clock position,
19 testified she heard someone seated at the
20 2:00 o'clock, which is where Melissa Phillips is
21 seated, call out, she's not breathing. And both
22 testified they heard Mr. Ray respond, leave her
23 there. We'll deal with her at the end of the next
24 round.

25 And Dr. Bunn told you she waited to hear

1 for Mr. Ray to do what a reasonable person would
2 do. Stop. Check up on that person who is not
3 breathing and take care of that person. And
4 instead you learned that Mr. Ray did not. Instead
5 you learned that he ordered the flap closed and
6 continued on introducing more heat and more searing
7 steam into that environment.

8 In addition to Laura Gennari, Dr. Bunn
9 and Melissa Phillips inside the sweat lodge, you
10 heard testimony from Dr. Nell Wagoner, who was
11 seated at the 5:00 o'clock position close to
12 Mr. Ray. You heard testimony from Mark Rock, who
13 was seated at the 12:00 o'clock position. You
14 heard testimony from Kim Brinkley, who was seated
15 at the 4:00 to 5:00 o'clock position. You heard
16 testimony from Dawn Gordon, who was seated at the
17 12:00 to 1:00 position. You heard from all of them
18 that they heard calls for help or called out or
19 heard calls that someone needed to get out. And
20 you heard testimony from all of them that Mr. Ray
21 said, the door is closing. Wait until the round is
22 over.

23 Dawn Gordon, seated at the 12:00 to
24 1:00 o'clock position, testified how James Shore
25 twice called out for help, the first time for

1 Kirby, and then the second time for both of them,
2 saying, we need help over here, before that final
3 round began.

4 You heard how James Shore desperately
5 tried to get air during that final round by opening
6 up the back of the tent and how Mr. Ray yelled out,
7 turn off that light. You heard how James Shore
8 sweetly offered solace to Kirby as the two of them
9 finally slipped into death.

10 Outside the tent three more witnesses --
11 Debbie Mercer, Sara Mercer and Fawn Foster --
12 testified about hearing similar things inside the
13 tent, expressions of concern about someone who is
14 unconscious and not responding and needed to get
15 out, how Mr. Ray said wait until the round is over,
16 how no one was brought out and how instead more
17 rocks were called for, more water, and the door was
18 closed, and things grew quiet.

19 That last round, according to witnesses,
20 was about 15 minutes, 15 more minutes of extreme
21 heat, searing steam, no air and no way out. Would
22 three people be dead if Mr. Ray had acted as a
23 reasonable person would in that situation?

24 And if when this horrific event, this
25 horrific heat-endurance challenge, was finally

1 over, would three people be dead if Mr. Ray had
2 taken immediate action to save them?

3 In considering whether this is an
4 accident, in considering whether Mr. Ray's
5 disregard of the risk that his conduct created, in
6 considering whether that risk was a gross deviation
7 from the standard of conduct of a reasonable person
8 in that situation, in considering whether his
9 conduct was inadvertent or headless, or was it
10 flagrant and extreme, consider it from the
11 perspective of someone who is new to the
12 organization -- Melinda Martin, someone who is not
13 a student of Mr. Ray's.

14 Melinda, as you heard, had been hired
15 just for a few short months. And unlike some Dream
16 Team members who had been part of Mr. Ray's events
17 in the past, she did not know what to expect from
18 that heat event.

19 You heard from Melinda that she learned
20 of Mr. Ray's teachings when she attended the events
21 and that she had heard him teach that breakthroughs
22 were always the theme and that you have to break
23 down in order to have a breakthrough.

24 Melinda Martin described to you her
25 growing horror with this heat event starting around

1 the first round and how she was told by that Dream
2 Team member to get the look of horror off her face
3 and how she sprang into action cooling, comforting
4 and consoling those who were in distress and shock.

5 Melinda Martin described for you how
6 Mr. Ray never stopped, never helped, never came out
7 to see if those people who had left early and who
8 were outside screaming -- if they were okay. Never
9 checked on anyone and how he just kept adding more
10 rocks, more water, more searing heat and more
11 searing steam.

12 Are those the actions of a reasonable
13 person in that situation? Are those the actions of
14 a man who is criminally reckless?

15 Death was not inevitable. And this was
16 not an accident. Mr. Ray had so many opportunities
17 to change the course of his conduct, but he did
18 not. And that is why we are here. But for
19 Mr. Ray's conduct, the victims would not be dead.

20 Mr. Li said it was wrong for me to leave
21 up photographs of these three victims when I did my
22 first closing. We are here because three people
23 died needlessly in Mr. Ray's horrific
24 heat-endurance challenge. We are here because
25 Mr. Ray recklessly caused their deaths. And yes.

1 I am going to remind you of why we are here. These
2 three people looking to improve their lives,
3 trusted that for \$10,000 Mr. Ray knew what he was
4 doing. And they trusted that for \$10,000 Mr. Ray
5 would keep him safe -- keep them safe in his sweat
6 lodge event.

7 And these three people lay in severe
8 distress in Mr. Ray's sweat lodge while others
9 around them tried to do what they could do to help,
10 while others around them called out to Mr. Ray that
11 they needed help and they needed to get out.

12 These three people lay in Mr. Ray's sweat
13 lodge dying while he continued to add more rocks,
14 more water, and more steam. These three people are
15 the reason we're here. We are here because but for
16 Mr. Ray's conduct, these three individuals -- Kirby
17 Brown, James Shore, and Liz Neuman -- would still
18 be alive.

19 What's wrong in this case is charging
20 \$10,000, telling participants you know what you're
21 doing, telling participants to trust you and to set
22 aside their own self-preservation instinct and then
23 recklessly, incredibly recklessly, holding this
24 ultimate challenge, this heat event, and in spite
25 of information that people are in distress,

1 unconscious, not breathing, need to get out,
2 continuing to act, continuing to create more of
3 that searing heat and more of that searing steam.
4 That's what's wrong with this case. Mr. Ray's
5 conduct in continuing to introduce that lethal heat
6 with three people down and in distress in his sweat
7 lodge.

8 We are here, ladies and gentlemen,
9 because Mr. Ray, because of his conduct -- we are
10 here because Mr. Ray intentionally used heat to
11 create this altered mental status and was
12 criminally reckless about the consequences. That
13 is what reckless manslaughter is about. And I ask
14 you again to find the defendant, Mr. Ray, guilty of
15 all three counts.

16 Thank you.

17 THE COURT: Thank you, Ms. Polk.

18 Ladies and gentlemen, in just a couple
19 minutes we'll be selecting the alternate jurors.

20 And for those of you who will be selected
21 as alternates, I have some very important
22 instructions. I'll say this a couple of times.
23 Don't go anywhere. Don't leave when -- if your
24 name is called, you need to stay there to get the
25 instructions. And, basically, the instructions are

1 these: It has to do with continuing the
2 admonition. Because even though you would not
3 start out deliberating with the 12-member jury,
4 it's possible that you may at some point.

5 So those of you who are selected as
6 alternates absolutely must follow the admonition
7 all the way through until you hear from this
8 office, from my office, otherwise. You have to
9 follow the admonition until you actually hear there
10 is a result in the case.

11 So remember to stay there.

12 At this time I'm going to ask if the
13 attorneys would like to inspect the draw box.

14 Ms. Polk?

15 MS. POLK: No, Your Honor. Thank you.

16 MR. LI: No, Your Honor.

17 THE COURT: Okay.

18 Then at this time I'm going to ask the
19 clerk to please select three alternates, of course,
20 one at a time. Please remember, just the number.

21 THE CLERK: Juror No. 2, Juror No. 8, Juror
22 No. 7.

23 THE COURT: Jurors No. 2, 7 and 8, your names
24 have been selected as the alternates. While you
25 are physically excused from your service as a juror

1 at this time, there remains a possibility you may
2 be called back to court to deliberate should one of
3 the other jurors be unable to do so.

4 The bailiff will retain your notes and
5 notebooks for your use if you're called back. The
6 admonition continues to apply to you. That's what
7 I've been stressing, all aspects of it. You have
8 to continue to follow the admonition in all
9 respects. Please do not discuss this case with
10 anyone or let anyone talk to you about it until
11 someone from my office notifies you a verdict has
12 been reached.

13 At this time I would want to swear in
14 both Ms. Rybar and Ms. Troxell as bailiffs.

15 And, ladies and gentlemen, in a moment I
16 will be reading to you the closing instruction that
17 will apply at this time.

18 Ms. Troxell I'm asking that the clerks
19 swear in both Ms. Troxell and Ms. Rybar as bailiffs
20 in this matter.

21 (Whereupon, the bailiffs were sworn by
22 the clerk.)

23 THE COURT: Thank you.

24 Ladies and gentlemen, in a minute, then,
25 you will go to the jury room and deliberate. You

1 will take your notes and your notebooks with you.

2 And I'm going to read that closing
3 instruction that you have. The case is now
4 submitted to you for decision. You are to discuss
5 the case and deliberate only, only, when all jurors
6 are together in the jury room. You are not to
7 discuss the case with each other or anyone else
8 during breaks or recesses.

9 The admonition I have given you during
10 the trial remains in effect when all of you are not
11 in the jury room deliberating.

12 After setting your schedule, I suggest
13 that you next review the written jury instructions
14 and verdict forms. It may be helpful for you to
15 discuss the instructions and verdict forms to make
16 sure that you understand them. Again, during your
17 deliberations you must follow the instructions and
18 refer to them to answer any questions about
19 applicable law, procedure and definitions.

20 Of course, your instructions -- there is
21 that substituted page for the amended page 8. I
22 want all of you to make sure you have correct sets
23 of jury instructions when you're deliberating as
24 well. And I'll remind you, as I did state when I
25 initially read the instructions, all 12 of you must

1 agree on a verdict on each count you consider. All
2 12 of you must agree whether the verdict is guilty
3 or not guilty.

4 When you go to the jury room, you will
5 choose a foreman, who will be in charge during your
6 deliberations and will sign any verdict form you
7 reach. Again, of course, "foreman" is a
8 gender-neutral term. Use "foreperson" if you
9 prefer.

10 With regard to the alternates, of course,
11 lunch has been ordered, and you can have that.
12 Again, you will not be deliberating initially with
13 the 12-member panel. But you can't talk among
14 yourselves, the alternates, about the case,
15 whatsoever. You still -- I'm speaking to the
16 alternates, all of you, when you're outside
17 deliberations. This would apply to the 12-member
18 jury. The admonition continues to apply in all
19 respects.

20 For the alternates, though, remember you
21 can't talk among yourselves at all. That's the
22 alternates.

23 And at this time, then, we will be in
24 recess. And the jurors now may go and deliberate
25 at this time.

1 Thank you.

2 (The jury is excused to deliberate.)

3 THE COURT: Counsel, just ask that you make
4 sure you have your cell phone numbers with the
5 bailiffs, Diane and Heidi.

6 So we'll be in recess. Thank you.
7 (Recess.)

8 THE COURT: We're on the record, which will
9 show that Mr. Ray and the attorneys are present.

10 A couple of notes from the jury. I hope
11 you got the copy of both of them. One was just
12 indicating the hours they wanted to deliberate,
13 9:00 to 4:30. I guess everybody is apprised of
14 that.

15 And the other question -- it's really not
16 substantive, but obviously I'm going to bring
17 questions to the parties' attention each time I get
18 one. The question was just was Exhibit 1000
19 admitted? If so, we cannot find it. 1000 was not
20 admitted. So I'm just answering, ladies and
21 gentlemen, Exhibit 1000 was not admitted, and
22 signing it.

23 And any comment on either of those?

24 MR. HUGHES: No objection.

25 MR. LI: No, Your Honor.

1 THE COURT: With regard to questions, that is
2 always the procedure when I get them. I get them
3 to the attorneys as soon as possible. If there is
4 any question -- if Mr. Ray is not here, I'd need to
5 know right away if there is a waiver of his
6 appearance on any question. But these are the
7 first things.

8 Thank you. Please remain seated.
9 Mr. Kelly.

10 MR. KELLY: Judge, as we indicated during
11 sidebar during the rebuttal closing from the State
12 of Arizona, we do need an opportunity, Judge, to
13 complete the record. And we're not even suggesting
14 a time right now. But I just want to advise you of
15 that.

16 THE COURT: Okay. Thank you.

17 Then here is the answer. Feel to look at
18 any of these. I'll give this to the clerk now.
19 Thank you.

20 Let's put this on the record. I think
21 that's anytime they might want to be deliberating.
22 Heidi indicated to me that some of the jurors were
23 asking question about availability. She said write
24 everything down. She doesn't answer questions.

25 One was apparently asking whether or

1 not -- tomorrow I said I would be present, but
2 after that probably not. And I don't intend -- if
3 it's not -- if there is not a verdict by tomorrow,
4 there will be a break at that point. But I don't
5 want to discuss that with the jurors at all. Only
6 if as they ask.

7 Mr. Hughes, I really think that was just
8 a general statement. This is the hours they want
9 to deliberate at least for today anyway. So in
10 light of that, we'll be recessing at 4:30 if they
11 don't return a verdict by then.

12 MR. KELLY: Judge, may I ask a question about
13 your comment? If they do not have a verdict by
14 tomorrow afternoon, then we can anticipate a break
15 Thursday and Friday?

16 THE COURT: Yes. The question would be resume
17 Monday or Tuesday. I'd want to resume as soon as
18 possible. I'd want them to resume as soon as
19 possible.

20 Anything else, Mr. Hughes?

21 MR. HUGHES: No, Your Honor.

22 MR. KELLY: No.

23 MR. LI: Thank you, Your Honor.

24 (Recess.)

25 THE COURT: Ms. Rybar is just going to get the

1 jury, and I'm going to excuse them for the evening
2 and recognize the schedule they've requested, ask
3 that they be back at 9:00 o'clock and remind them
4 of the admonition and also the other aspects of
5 paragraph 11 and the instructions. They cannot
6 deliberate until they're all assembled, those
7 things. They should be in momentarily.

8 (Proceedings continued in the presence of
9 jury.)

10 THE COURT: The record will show the presence
11 of Mr. Ray, the attorneys and the jury.

12 And, ladies and gentlemen, you have your
13 proposed schedule. And that's just fine. 9:00 to
14 4:30. So I'm going to go ahead and excuse you for
15 the evening. I just want to remind you of all of
16 those things that we discussed over the months
17 about following the admonition in all respects.

18 And also the other things that are stated
19 there in your instruction No. 11. Remember you
20 cannot deliberate tomorrow or anytime until all of
21 you are assembled. So you get the times. You
22 cannot start talking about the case with just a few
23 of you there or two of you there. You have to all
24 be assembled and start your deliberations. And
25 Heidi will, of course, assist you with whatever you

1 need.

2 So we will go ahead and take the evening
3 recess at this time. Again, remember all aspects
4 of the admonition. And at your request, I'll see
5 you tomorrow at 9:00 o'clock.

6 Thank you. You are excused for the
7 evening.

8 (Proceedings continued outside presence
9 of jury.)

10 THE COURT: Mr. Hughes, Ms. Polk, anything you
11 want on the record before we recess for the
12 evening?

13 MS. POLK: No, Your Honor.

14 THE COURT: Mr. Kelly?

15 MR. KELLY: Two questions. One is are you
16 going to seat the jury and excuse them at
17 9:00 o'clock? And do we need to be present if you
18 do?

19 THE COURT: At 9:00 they'll just assemble in
20 there. So no one would have to be here right at
21 9:00 as far as that goes. They just need to follow
22 paragraph 11.

23 MR. KELLY: Secondly, Judge, if we could have
24 about 15 minutes of your time at about 9:30
25 tomorrow morning to complete the record in regards

1 to our pending motion, as we discussed at sidebar.

2 THE COURT: I will be here.

3 MR. KELLY: Thank you.

4 THE COURT: Thank you.

5 (The proceedings concluded.)

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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 2nd day of July, 2011.

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MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335

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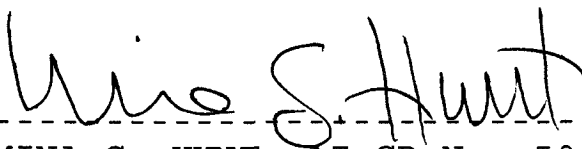
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